IMPROVING THE COURT SYSTEM OF THE EUROPEAN UNION?

The 2015 reform of the General Court in historical context and looking ahead

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Contents

SOURCES

LITERATURE

Alemanno and Pech (2017)
Alemanno, Alberto and Pech, Laurent: Thinking justice outside the docket: A critical assessment of the reform of the EU's court system, 54 CML Rev 2017, p.129.

Arnull (1994)
Arnull, Anthony: Refurbishing the judicial architecture of the European Community, 54(2) ICLQ (1994), p. 296.

Arnull (1995)
Arnull, Anthony: The Community judicature and the 1996 IGC, 20(6) EL Rev (1995), p. 599.

Arnull (1999)
Arnull, Anthony: Judicial architecture or judicial folly? The challenge facing the European Union, 24(5) EL Rev (1999), p. 516.

Arnull (2006)
Arnull, Anthony: The European Union and its Courts of Justice. Second edition. Oxford University Press 2006.

Arnull (2018)
Arnull, Anthony: The Court of Justice Then, Now and Tomorrow. In Derlén, M and Lindholm, J (eds.), The Court of Justice of the European Union, Multidisciplinary Perspectives. Hart Publishing, 2018, p. 211.

Azizi (2006)
Azizi, Josef: Opportunities and Limits for the Transfer of Preliminary Reference Proceedings to the Court of First Instance. In I. Pernice, J. Kokott and C. Saunders (eds), The Future of The European Judicial System in a Comparative Perspective: 6th International ECLN-Colloquium /IACL Round Table Berlin, 2-4 November 2005. Nomos Publishers 2006, p. 241.

Barents (2010)
Barents, René: The Court of Justice after the Treaty of Lisbon, 47 CML Rev (2010), p. 709.

Brown and Kennedy (1994)
Brown, L. Neville and Kennedy, Tom: The Court of Justice of the European Communities, 4th edition. Sweet and Maxwell 1994.

Brown and Kennedy (2000)

Brown, L. Neville and Kennedy, Tom: The Court of Justice of the European Communities, 5th edition. Sweet and Maxwell 2000.

Craig (2001)

Craig, Paul: The Jurisdiction of the Community Courts Reconsidered. In G. de Búrca and J.H.H. Weiler (eds.), The European Court of Justice. Oxford University Press 2001, p. 177.

De Waele (2015)

De Waele, Henri: Not Quite the Bed that Procrustes Built: Dissecting the System for Selecting Judges at the Court of Justice of the European Union. In M. Bobek (ed.) Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts. Oxford University Press 2015, p. 24.

Dehousse (2011)

Dehousse, Franklin (with the collaboration of Mathilde Rouland): The Reform of the EU Courts: The Need of a Management Approach. Egmont Paper No. No. 53, 2011.

Dehousse (2016a)

Dehousse, Franklin (with the collaboration of Benedetta Marsciola): The reform of the EU courts (II). Abandoning the management approach by doubling the General Court. Egmont Paper No. 83, 2016.

Dehousse (2016b)

Dehousse, Franklin: The Reform of the EU Courts (III): The Brilliant Alternative Approach of the European Court of Human Rights. Egmont Paper No. 86, 2016.

Dehousse (2017)

Dehousse, Franklin: The Need for a Better Focus on the European Court of Justice's Core Mission. Egmont Paper No. 96, 2017.

Delhaye and Lhoëst (2010)

Delhaye Loïc – Lhoëst, Nicolas: La jurisprudence du TFPUE: comment concilier contrôle de légalité et dimension humaine ? Actes du colloque organisé à l'occasion du 5ème anniversaire du Tribunal de la Fonction Publique de l'UE, Luxemburg, October 2010.

Dumbrovský (2011)

Dumbrovský, Tomas: The European Court of Justice after the Eastern Enlargement: An Emerging Inner Circle of Judges. EUSA Conference Paper. Boston 2011 (updated version 2013).

Dumbrovský, Petkova and van der Sluis (2014)

Dumbrovský Tomáš, Petkova Bilyana and van der Sluis, Marijn: Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States, 51 CML Rev (2014), p. 455.

Dyrberg (2001)
Dyrberg, Peter: What should the Court of Justice be doing? 26(3) EL Rev 2001, p. 291.

Edward (1995)
Edward, David: How the Court of Justice Works, 20 EL Rev (1995), p. 539.

Edward (2004)
Edward, David: Luxembourg in retrospect: a new Europe in prospect, European Business Journal (2004), p. 120.

Geelhoed (2005)
Geelhoed, Ad: The expanding jurisdiction of the EU court of justice. In D. Curtin, A.E. Kellerman, and S. Blockmans (eds), The EU Constitution: the best way forward? T.M.C. Aseer Press 2005, p. 400.

Guinchard (2011)
Guinchard, Emmanuel: Breaking point in Luxembourg, New Law Journal (2011), p. 992.

Hadroušek and Smolek (2015)
Hadroušek, David and Smolek, Martin: Solving the European Union's General Court, 40(2) EL Rev (2015), p. 188.

Huyue Zhang (2016)
Huyue Zhang, Angela: The Faceless Court, Vol. 38(1) University of Pennsylvania Journal of International Law (2016), p. 94.

Iannone (2005)
Iannone, Celestina: La Cour de Justice: une Cour de cassation et une Cour constitutionnelle à 25? Il Diritto dell'Unione Europea, 1/2005, p. 159.

Jacobs (2004)
Jacobs, Francis: Recent and Ongoing Measures to Improve the Efficiency of the European Court of Justice, 29 EL Rev (2004), p. 823.

Jacobs (2013)
Jacobs, Francis: The Court of Justice in the Twenty-First Century: Challenges Ahead for the Judicial System? In Y. Bot, A. Rosas and E. Levits (eds.), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law. T.M.C. Asser Press 2013, p. 49.

Jacqué and Weiler (1990)
Jacqué, Jean-Paul and Weiler, Joseph H.H.: On the road to European Union – a new judicial architecture: An agenda for the Intergovernmental Conference, 27 CML Rev (1990), p. 185.

Jaeger (2009)

Marc Jaeger: Le temps de réforme est-il arrive? In relation to Colloqium "*Celebration of 20 years of the Court of First Instance of the European Communities - From 20 to 2020, building the CFI of tomorrow on solid foundations*", organised on 25 September 2009. [https://curia.europa.eu/jcms/jcms/P_52392/]

Jaeger (2017)

Jaeger, Marc: 25 years of the General Court: Looking back and forward. In V. Tomljenović, N. Bodiroga-Vukobrat, V. Butorac Malnar, I. Kunda (eds.), EU Competition and State Aid Rules: Public and private Enforcement. Springer 2017, p. 3.

Johnston (2001)

Johnston, Angus: Judicial reforms and the Treaty of Nice, 39 CML Rev (2001), p. 499.

Lavranos (2005),

Lavranos, Nikolaos: The new specialised courts within the European judicial system, 30(2) EL Rev 2005, p. 261.

Lotarski (2004)

Lotarski, Jaroslaw: L'architecture judiciaire de l'Union européenne de demain, in Mélanges en hommage à Guy Isaac – 50 ans du droit communautaire, tome 2, Presses de l'Université des sciences sociales de Toulouse, 2004, p. 717.

Kanninen (2006)

Kanninen, Heikki, Le Tribunal de la function publique de l'UE – la première jurisdiction spécialisée dans le système juridictionnel de l'Union européenne. In M. Johansson, N. Wahl and U. Bernitz (eds.), Liber Amicorum in honour of Sven Norberg. Bruylant 2006, p. 287.

Kennedy (1989)

Kennedy, Tom: The essential minimum: the establishment of the Court of First Instance, 14(1) EL Rev (1989), p. 7.

Keppenne (2017)

Keppenne, Jean-Paul: Les procédures de révision du cadre réglementaire des juridictions de l'Union. Cahiers de droit européen, Numéro 2/2017, p. 343.

Khan (2002)

Khan, Nicholas: All change at the Court of First Instance, 24 European Lawyer 2002/03, p. 12.

Kraemer (2009)

Kraemer, Hannes: The European Union Civil Service Tribunal: A new Community Court examined after four years of operation, 46 CML Rev (2009), p. 1873.

Meij (2000)

Meij, Arjen W.H.: Architects or judges? Some comments in relation to the current debate, 37 CML Rev (2000), p. 1039.

Meij (2013)

Meij, Arjen W.H.: Amending the Statute of the EU Courts, 20(1) Maastricht Journal of European and Comparative Law (2013), p. 127.

Millet (1989)

Millet, Timothy: The new European Court of First Instance, 38(4) ICLQ (1989), p. 811.

Naômé (2008)

Naômé, Caroline: EU enlargement and the European Court of Justice. In E. Best, T. Christiansen and P. Settembri (eds.), The Institutions of the Enlarged European Union: Continuity and Change. Edward Elgar Publishing 2008, p. 100.

O'Leary (2011)

O'Leary, Siofra: Applying principles of EU social and employment law in EU staff cases, 36(6) European Law Review (2011), p. 769.

Petit (2013)

Petit, Nicolas: *Éthique et conflits d'intérêts en droit européen de la concurrence*, Concurrences, 2013/1, p. 1.

Rasmussen (2000)

Rasmussen, Hjalte: Remedying the Crumbling EC Judicial System, 37(5) CML Rev (2000), p. 1071.

Rodriguez Iglesias (2000a)

Rodriguez Iglesias, Gil Carlos: Time for ECJ reform, 1(3) European Lawyer (2000), p. 3.

Rodriguez Iglesias (2013)

Rodriguez Iglesias, Gil Carlos: L'évolution de l'architecure juridictionnelle de l'Union européenne. In Y. Bot, A. Rosas and E. Levits (eds.), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law. T.M.C. Asser Press 2013, p. 37.

Rosas – Kaila (2006),

Rosas, Allan – Kaila, Heidi: Euroopan yhteisöjen tuomioistuin vuoden 2004 laajentumisen jälkeen. Oikeus 2006/1, p. 73.

Rosas – Kaila (2010)

Rosas, Allan – Kaila, Heidi: Euroopan unionin tuomioistuin ja Lissabonin sopimus, in *Länsineva – Tuomisto – Wikström – Viljanen* (eds.): Juhlakirja Heikki Kulla 1950, Turku 2010, p. 261.

Ruiz-Jarabo Colomer (2001)

Ruiz-Jarabo Colomer, Dámaso: La réforme de la Cour de justice opérée par le traité de Nice et sa mise en oeuvre future, 37(4) RTDE (2001), p. 705.

Sarmiento (2017)

Sarmiento, Daniel: The Reform of the General Court: An Exercise in Minimalist (but Radical) Institutional Reform, 19 Cambridge Yearbook of European Legal Studies (2017), p. 236.

Schermers (1988)

Schermers, Henry G.: The European Court of First Instance, 25 CML Rev (1988), p. 541.

Scorey (1996)

Scorey, David W.J.: A new model for the Communities' judicial architecture in the new Union, 21(3) EL Rev (1996), p. 224.

Sharpston (2013)

Sharpston, Eleanor: Effective Judicial Protection through Adequate Judicial Scrutiny – Some Reflections, 4(6) Journal of European Competition Law & Practice (2013), p. 453.

Sundström & Kauppi (1998)

Sundström, Zacharias and Kauppi, Matti (eds.): Access to Justice, A record of thoughts and ideas dealing with the interrelationship between national law and community law and courts. The Nordic conference on the European Union, Access to Justice, the Rule of Law and Due Process, 6-8 November 1998, Hanasaari. Finnish Association for European Law, No 6.

Tamm (2013)

Tamm, Ditlev: The History of the Court of Justice of the European Union Since its Origin. In Y. Bot, A. Rosas and E. Levits (eds.), The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law. T.M.C. Asser Press 2013, p. 9.

Tridimas (1997)

Tridimas, Takis: The Role of the Advocate General in the Development of Community Law: Some Reflections, 34(6) Common Market Law Review (1997), p. 1349.

Tridimas (2018)

Tridimas, Takis: The Court of Justice of the European Union. In R. Schütze and T. Tridimas (eds.), Oxford Principles of European Union Law: Volume 1: The European Union Legal Order. Oxford University Press 2018, p. 581.

Van der Woude (1992)

Van der Woude, Marc: The Court of First Instance: The first three years, 16 Fordham International Law Journal (1992), p. 412.

Van Gerven (1996)

Van Gerven, Walter: The role and structure of the European judiciary now and in the future, 21(3) EL Rev (1996), p. 211.

Van Ginderachter (1989)

Van Ginderachter, Eric: Le Tribunal de première Instance des Communautés européennes - Un nouveau-né prodige? Cahiers de droit européen, L. 1989, n° 1-2. Bruxelles: Bruylant.

Vandersanden (1991)

Vandersanden, Georges: A Desired Birth: The Court of First Instance of the European Communities, 21:51 Ga. J. Int'l & Comp. L. (1991), p. 51.

Vandersanden (2015)

Vandersanden, Georges: The real Test – How to Contribute to a Better Justice: The Experience of the Civil Service Tribunal. In M. Bobek (ed.), Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts. Oxford University Press 2015, p. 86.

Vesterdorf (1992)

Vesterdorf, Bo: The Court of First Instance of the European Communities After Two Full Years in Operation, 29 CML Rev (1992), p. 897.

Vesterdorf (2003)

Vesterdorf, Bo: The Community Court system ten years from now and beyond: challenges and possibilities, 28(3) EL Rev (2003), p. 303.

Vesterdorf (2006)

Vesterdorf, Bo: A Constitutional Court for the EU? 4(1) International Journal of Constitutional Law (2006), p. 607.

Voss (1993)

Voss, Reimer: The National Perception of the Court of First Instance and the European Court of Justice, 30 CML Rev (1993), p. 1119.

Wouters (2001)

Wouters, Jan: Institutional and constitutional challenges for the European Union – some reflections in the light of the Treaty of Nice, 26(4) EL Rev (2001), p. 342.

Öberg, Ali and Sabouret (2018)

Öberg, Ulf, Ali, Mohamed and Sabouret, Pauline: On Specialisation of Chambers at the General Court. In Derlén, M and Lindholm, J (eds.), The Court of Justice of the European Union, Multidisciplinary Perspectives. Hart Publishing, 2018, p. 211.

BLOG POSTS AND NEWSPAPER ARTICLES

Abenhaïm (2014a)

Abenhaïm, Marc: Note on a missed opportunity for the administration of justice across Europe, in Kluwer Competition Law Blog, 24 March 2014 [http://competitionlawblog.kluwercompetitionlaw.com/2014/03/24/note-on-a-missed-opportunity-for-the-administration-of-justice-across-europe/] (11 January 2017)

Abenhaïm (2014b)

Abenhaïm, Marc: Follow-up Note on Another Missed Opportunity for the Administration of Justice Across Europe, in Kluwer Competition Law Blog, 16 December 2014 [http://competitionlawblog.kluwercompetitionlaw.com/2014/12/16/follow-up-note-on-another-missed-opportunity-for-the-administration-of-justice-across-europe/] (11 January 2017)

Abenhaïm (2016)

Abenhaïm, Marc: Epilogue, at last, on the reform of the General Court, Kluwer Competition Law Blog, 26 January 2016 [http://competitionlawblog.kluwercompetitionlaw.com/2016/01/26/epilogue-at-last-on-the-reform-of-the-general-court/] (11 January 2018)

Ahtela (2016)

Ahtela, Kaija: Kemikaalivirasto on aikapommi, joka voi räjähtää, in Kauppalehti, 25 April 2016, [https://www.kauppalehti.fi/uutiset/kemikaalivirasto-on-aikapommi--joka-voi-rajahtaa/F9cZ9sJP] (26 May 2018)

Alemanno (2017)

Alemanno, Alberto: Reform of the European Court of Justice: "What caseload backlog?", in The Good Lobby [Blog], 1 June 2016 [http://www.thegoodlobby.eu/reform-at-the-cjeu/] (24 August 2017)

Alemanno & Pech (2015a)

Alemanno, Alberto and Pech, Laurent: Reform of the EU's Court System: Why a more accountable – not a larger – Court is the way forward, in EU Law Analysis [Blog], 16 June 2015 (http://eulawanalysis.blogspot.fi/2015/06/reform-of-eus-court-system-why-more.html) (24 August 2017)

Alemanno & Pech (2015b)

Alemanno, Alberto and Pech, Laurent: Where do we stand on the reform of the EU's Court system? On a reform as short-sighted as the attempts to force through its adoption, Verfassungsblog, 23 September 2015 (http://verfassungsblog.de/where-do-we-stand-on-the-reform-of-the-eus-court-system-on-a-reform-as-short-sighted-as-the-attempts-to-force-through-its-adoption/) (24 August 2017)

Croft (2014)

Crofts, Lewis: EU judge calls for an 'independent' review to spur court reform, Mlex market insight, 19 September 2014 (23 September 2014)

Ducourtieux (2015)

Ducourtieux, Cécile: Guerre des nerfs sur les moyens de la Cour de justice européenne, Le Monde, 20 May 2015 [https://www.lemonde.fr/europe/article/2015/05/19/guerre-des-nerfs-sur-les-moyens-de-la-cour-de-justice-europeenne_4636312_3214.html] (24 August 2017)

Ducourtieux (2016)

Ducourtieux, Cécile: Koen Lenaerts: "Faire la balance entre règles européennes et sensibilités nationales", Le Monde 4 February 2016 [https://www.lemonde.fr/europe/article/2016/02/04/koen-lenaerts-faire-la-balance-entre-regles-europeennes-et-sensibilites-nationales_4859589_3214.html] (24 August 2017)

Heath (2015a)

Heath, Ryan: EU judges at war, in POLITICO Brussels Playbook newsletter, 28 April 2015, updated 29 April 2015 https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-eu-judges-at-war-varoufakis-out-the-le-pens-top-twiplomats-spokespeople-shuffle/

Heath (2015b)

Heath, Ryan: Warring EU judges, act II, in POLITICO Brussels Playbook newsletter, 29 April 2015 [https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-migration-political-crisis-vestagers-second-strategy-nato-rumblings/]

Hirst (2016)

Hirst, Nicolas: Judges 'pray' for cases as European court expands, in Politico, 14 June 2016, [https://www.politico.eu/article/judges-pray-for-cases-european-general-court-expands-bored-backlog-clearing-reform/] (4 March 2018)

Hirst (2017)

Hirst, Nicolas: Former judge sues EU court amid allegations of mismanagement", in Politico, 8 November 2017 (updated 9 November 2017) [https://www.politico.eu/article/former-judge-sues-eu-court-amid-allegations-of-financial-mismanagement] (4 March 2018)

Kanter (2016)

Kanter, James: Costly compromises Stir Fury at the European Union, The New York Times, June 17, 2016 [https://www.nytimes.com/2016/06/18/business/international/costly-compromises-stir-fury-with-the-european-union.html] (6 May 2018)

Mendick (2014)

Mendick, Robert: Justice, the EU and its £ 415m gilded Tower of Babel, The Daily Telegraph, 8 February 2014 [https://www.telegraph.co.uk/news/worldnews/europe/eu/10626146/Justice-the-EU-and-its-415m-gilded-Tower-of-Babel.html] (8 May 2018)

Peers (2014)

Peers, Steve: Building the EU Judicial System: Politicians 1, (Judicial) Architects 0, EU Law Analysis [Blog], 23 November 2014 [http://eulawanalysis.blogspot.fi/2014/11/building-eu-judicial-system-politicians.html] (11 February 2017)

Peers (2015)

Peers, Steve: Don't mention the extra judges! When CJEU reform turns into farce, in EU Law Analysis [Blog], 3 July 2015 [http://eulawanalysis.blogspot.fi/2015/07/dont-mention-extra-judges-when-cjeu.html] (11 February 2017)

Quatremer (2015)

Quatremer, Jean: La justice européenne au bord de la crise de nerfs, in Coulisses de Bruxelles [Blog] of the Libération, 26 April 2015 (updated on 27 April 2015). [http://bruxelles.blogs.liberation.fr/2015/04/26/la-justice-europeenne-au-bord-de-la-crise-de-nerfs/] (29 April 2015)

Robinson (2015a)

Robinson, Duncan: European Court of Justice doubles number of judges, in Brussels Blog of the Financial Times, 12 April 2015 [https://www.ft.com/content/562d0236-df97-11e4-a6c4-00144feab7de] (13 April 2017)

Robinson (2015b)

Robinson, Duncan: The multiplying judges of the ECJ, in Brussels Blog of the Financial Times, 17 April 2015 [https://www.ft.com/content/4ce57462-8656-3fd3-973e-01b33c15dc6b] (10 October 2016)

Robinson (2015c)

Robinson, Duncan: The 1st rule of the ECJ's fight club… is about to be broken, in Brussels Blog of the Financial Times, 27 April 2015 [https://www.ft.com/content/b3979694-b42b-38b4-b1a7-dddbdb2c1878] (11 January 2017)

Robinson (2015d)

Robinson, Duncan: ECJ Fight Club: EU's top judge complains about MEP, in Brussels Blog of the Financial Times, 30 June 2015 [https://www.ft.com/content/de6f4200-2c59-380c-a8b2-db0d4b15144c] (11 January 2017)

Robinson (2015e)

Robinson, Duncan: ECJ Judge faces potential censure in row over court reform, Financial Times, 2 July 2015 [https://www.ft.com/content/9c28d9b4-1e48-11e5-aa5a-398b2169cf79] (1 November 2017)

Rodriguez Iglesias (2000b)

Rodriguez Iglesias, Gil Carlos: Réformer la Cour de Justice européenne, published in "Le Monde" on 28 April 2000.

Rosas (2004)

Rosas, Allan: Unionin laajentuminen vahvisti EU:n tuomioistuimia, in Turun Sanomat, 26 September 2004, [http://www.ts.fi/mielipiteet/paakirjoitukset/1073988478/Allan+Rosaksen+aliokirjoitus+Unionin+laajentuminen+vahvisti+EUn+tuomioistuimia] (17 February 2016)

Sarmiento (2015a)

Sarmiento, Daniel: The Skouris legacy and the Skouris Court, Despite our Differences [Blog], 8 October 2015 [https://despiteourdifferencesblog.wordpress.com/2015/10/08/the-skouris-legacy-and-the-skouris-court/] (4 March 2018)

Sarmiento (2015b)

Sarmiento, Daniel: And then there were eleven [Advocates general], Despite our Differences [Blog], 2 November 2015, [https://despiteourdifferencesblog.wordpress.com/2015/11/02/and-then-there-were-eleven-advocates-general/] (11 February 2017)

Sarmiento (2015c)

Sarmiento, Daniel: The reform of the General Court; unleashing the forces of change, Despite our Differences [Blog], 15 December 2015, [https://despiteourdifferencesblog.wordpress.com/2015/12/15/the-reform-of-the-general-court-unleashing-the-forces-of-change/] (11 February 2017)

Seytre (2016)

Seytre, Dominique: Koen Lenaerts: Le Tribunal doit prendre au sérieux son rôle de "High Court of the Union", Le Jeudi, 27 January 2016 [http://jeudi.lu/koen-lenaerts-le-tribunal-doit-prendre-au-serieux-son-role-de-high-court-of-the-union/] (27 May 2018)

Stehle (2015)

Stehle, Anja: Overload at the European Court of Justice, Handelsblatt, 8 September 2015, [https://global.handelsblatt.com/politics/overload-at-the-european-court-of-justice-303215] (5 May 2018)

Teffer (2016)

Teffer, Peter: Court of Justice defends doubling number of judges, EU Observer, 6 April 2016 [https://euobserver.com/institutional/132933] (27 May 2018)

Weiler (2016)

Weiler, Joseph H.H.: A Faustian Deal?, in I-CONnest [Blog] 14, Issue 2 [http://www.iconnectblog.com/2016/07/a-faustian-deal-i%C2%B7con-14-issue-2-editorial/] (27 May 2018)

UNOFFICIAL DOCUMENTS AND PUBLICATIONS

The role and future of the European Court of Justice, A report by Members of the EC Section of the British Institute's Advisory Board chaired by The Rt. Hon. The Lord Slynn of Hadley, British Institute of International and Comparative Law, 1996.

Court of Justice of the European Communities, Annual Report 1997. Office for Official Publications of the European Communities, 1998.

Statistical information of the Court of Justice (1997). [https://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/st97cr_2008-09-30_16-42-41_25.pdf]

Proceedings of the Court of First Instance in 1999, Luxembourg.

Statistics of Judicial Activity of the Court of First Instance 1999, Luxembourg.

Report by the working party on the future of the European communities' court system ("The Due report"), January 2000. [http://ec.europa.eu/dgs/legal_service/pdf/due_en.pdf]

Court of Justice of the European Communities, Annual Report 2003, Luxemburg 2004.

An EU Competition Court: report with evidence, House of Lords: European Union Committee, 15th report of session 2006-07. The Stationery Office Limited 2007.

Court of Justice of the European Communities, Annual Report 2008, Luxemburg 2009.

"From 20 to 2020 – Building the CFI of tomorrow on solid foundations", Celebration of the twentieth anniversary of the Court of First Instance of the European Communities 25 September 2009 in Luxembourg, Programme and contributions of participants [https://curia.europa.eu/jcms/jcms/P_52284/]

Court of Justice of the European Union, Annual Report 2010, Luxemburg 2011.

The Workload of the Court of Justice of the European Union. House of Lords: European Union Committee, 14th report of session 2010-11. The Stationary Office Limited 2011.

The Workload of the Court of Justice of the European Union. House of Lords: European Union Committee, Justice and institutions sub-committee, The Workload of the Court of Justice of the European Union, "Oral evidence with associated written evidence" [https://www.parliament.uk/documents/lords-committees/eu-sub-com-e/CourtofJustice/CJEUoeawe.pdf]

The Workload of the Court of Justice of the European Union. House of Lords: European Union Committee, Justice and institutions sub-committee, The Workload of the Court of Justice of the European Union, "Written evidence" [https://www.parliament.uk/documents/lords-committees/eu-sub-com-e/CourtofJustice/euewrittenevidence.pdf]

Court of Justice of the European Union, Annual Report 2011, Luxemburg 2012.

Press release, 3210th Council Meeting, General Affairs, Brussels on 11 December 2012, in Council doc. 17439/12.

Court of Justice of the European Union, Annual Report 2012, Luxemburg 2013.

CCBE Conference "EU Courts – Looking Forward", Brussels, 28 April 2014. [http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/PD_LUX/PDL_Conferences/EN_PDL_20140703_Presentations-from-the-conference-EU-Courts-looking-forward-that-took-place-on-28-April-in-Brussels.pdf]

A memorandum of the European Public Service Union (EPSU) of 1 December 2014, "No to abolishing the CST!" [http://epsu-cj.lu/wp-content/uploads/2014/12/2014-11_TFP_tract_EN.pdf]

Court of Justice of the European Union, Annual Report 2014, Luxemburg 2015.

Court of Justice of the European Union, Press Release No 44/2015, Reform of the Court System.

Resolution on the recasting of the EU's judicial framework and the planned abolition of the Civil Service Tribunal", approved by *Union syndicale fédérale des Services publics européens et internationaux* in its congress in Dubrovnik on 4-5 May 2015.

Press release of the Council meeting, No 886/15, Court of Justice of the EU: Council adopts reform of General Court.

Court of Justice of the European Union, Annual Report 2015, Luxemburg 2016.

Court of Justice of the European Union, Annual Report 2016, Luxemburg 2017.

Fourth activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, published 10 February 2017. [https://curia.europa.eu/jcms/jcms/P_64268/en/]

European Court of Auditors, Special Report: Performance review of case management at the Court of Justice of the European Union (2017, No 14).

Communication from the Commission — EU law: Better results through better application, C/2016/8600, OJ 2017 C 18, p. 10.

Court of Justice of the European Union, Press Release No 36/2018, Judicial statistics 2017: the number of cases brought has once again exceeded 1 600.

Court of Justice of the European Union, Annual Report 2017, Luxemburg 2018.

LEGAL ACTS OF THE EUROPEAN UNION

Primary Law

Treaty Establishing the European Coal and Steel Community, 261 UNTS 140.

Treaty establishing the European Economic Community, 298 UNTS 11.

Treaty establishing the European Atomic Energy Community, 298 UNTS 167.

Convention on Certain Institutions Common to the European Communities, Rome, 25 March 1957.

Treaty Establishing a Single Council and a Single Commission of the European Communities, OJ 1965 152, p. 1.

Single European Act, OJ 1987 L 169, p. 1.

Treaty on European Union, signed at Maastricht on 7 February 1992, OJ 1992 C 191, p. 1.

Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, OJ 1997 C 340, p. 1.

Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, OJ 2001 C 80, p. 1.

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007 C 306, p. 1.

Treaty on the European Union (consolidated version), OJ 2012 C 326, p. 13.

Treaty on the Functioning of the European Union (consolidated version), OJ 2012 C 326, p. 47.

Statute of the Court of Justice of the European Union (consolidated version), [https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf]

Secondary law

Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ 1988 L 319, p. 1.

Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1993 L 144, p. 21.

Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ 1994 L 11, p. 1.

Council Decision 94/149/ECSC, EC, of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1994 L 66, p. 29.

Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004/752/EC, Euratom, OJ 2004 L 333, p. 7.

Council Decision of 22 July 2005 appointing Judges of the European Union Civil Service Tribunal, 2005/577/EC, Euratom, OJ 2005 L 197, p. 28.

Decision of the President of the Court of Justice recording that the European Union Civil Service Tribunal has been constituted in accordance with law, OJ 2005 L 325, p. 1.

Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, OJ 2012 L 228, p. 1.

Rules of Procedure of the Court of Justice of 25 September 2012 (OJ L 265), as amended on 18 June 2013 (OJ L 173, p. 65) and on 19 July 2016 (OJ L 217, p. 69).

Rules of Procedure of the General Court of 4 March 2015 (OJ 2015 L 105, p. 1).

Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ 2015 L 341, p. 14.

Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ 2016 L 200, p. 137.

Method of designation of the Judge replacing a Judge prevented from acting, OJ 2016 C 296, p. 2.

Criteria for the assignment of cases to Chambers, OJ 2016 C 296, p. 2.

Composition of the Grand Chamber, OJ 2016 C 296, p. 3.

Code of Conduct for Members and former Members of the Court of Justice of the European Union, OJ 2016 C 483, p. 1.

PREPARATORY DOCUMENTS

Documents of the Council of the European Union

Reform of the Statute of the Court of Justice of the European Union – Information from the Presidency, doc. 17657/11.

Presidency document, “Reform of the General Court – Factual information”, doc. 14916/12.

Presidency document, "Reform of the General Court of the European Union", doc. 5355/14.

Presidency document “Reform of the General Court - Way forward”, doc. 16576/14.

Summary record of the meeting of the European parliament Committee on Legal Affairs (JURI), held on Brussels on 24 September 2014, doc. 13756/14.

Summary record of the meeting of the European parliament Committee on Legal Affairs (JURI), held on Brussels on 23-24 February 2015, doc. 6752/15.

Reform of the General Court − A letter from March 2015 by the rapporteur of the European Parliament, Mr. Marinho e Pinto, to the Presidency, and the Presidency's reply of 22 April 2015. Doc. 8484/15.

Position of the Council at first reading in view of the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union - Adopted by the Council on 23 June 2015, doc. 9375/1/15.

Documents of the European Commission

Proposal for a Council Regulation (Euratom, ECSC, EEC) amending the staff regulations of officials and conditions of employment of other servants of the European Communities and establishing an administrative tribunal of the European Communities, COM/1978/395/CNS, OJ 1978 C 225, p. 6.

Establishment of a Court of First Instance. Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council decision establishing a Court of First Instance (CFI) and amending the statutes of the Court of Justice, SEC(88) 366 final, 18 May 1988.

Letter of 8 November 1985 from the President of the CJEC, Lord Mackenzie Stuart to President of the Council, Jacques F. Poos. On file with the author.

Letter of 29 September 1987 from the President of the CJEC, Lord Mackenzie Stuart, to the President of the Council Uffe Ellemann-Jensen. On file with the author.

Establishment of a Court of First Instance. Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council decision establishing a Court of First Instance (CFI) and amending the statutes of the Court of Justice, SEC(88) 366 final, 18 May 1988 and the supplementary document, SEC(88)1121 final, 20 July 1988.

Proposal for a Council Decision establishing a European Civil Service Tribunal, COM(2003) 705 final, 19.11.2003.

Commission opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596 final.

Opinion of the Commission pursuant to Article 294(7)(c) of the Treaty on the Functioning of the European Union, on the European Parliament's amendments to the Council's position on the proposal for a Regulation of the European parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, COM(2015) 569 final.

Commission opinion on the proposal for a regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants, COM(2016) 081 final.

Documents of the European Parliament

Legislative resolution of the European Parliament on proposal for a Council Decision establishing a Court of First Instance of the European Communities, adopted at its sitting of 17 June 1988, OJ 1988 C187, p. 223.

Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, 02074/2011 C7-0126/2012 – 2011/0901B(COD).

Summary of the Committee on Legal Affairs (JURI) of the European Parliament, held in Brussels on 22, 24 and 25 April 2013. In Council doc. 9077/13.

Amendments adopted by the European Parliament on 12 December 2013 on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of judges at the General Court. [P7 TA(2013)0581].

Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court, 02074/2011 – C7-0126/2012 – 2011/0901B(COD).

Information note drafted by the General Secretariat of the Council: Draft Regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto – Outcome of the European Parliament's proceedings (Strasbourg, 9 to 12 December 2013). In Council doc. 17499/13.

European Parliament legislative resolution of 15 April 2014 on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)).

Draft recommendation for second reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD)).

Jozo Radoš (ALDE), Question for written answer to the Council, Subject: More judges for the Court of Justice: impact assessment and the reply of the Council, E-007778-2015.

António Marinho e Pinto (ALDE), 23 March 2015, Question for written answer for the Commission, Subject: Abolition of the Civil Service Tribunal and lack of consultation with the Commission and the reply of the Commission, E-004583-15.

European Parliament legislative resolution of 28 October 2015 on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD)).

Documents of the Court of Justice of the European Union

"Mémorandum de la Cour sur les mesures qu'elle juge nécessaires aux fins de son fonctionnement actuel et futur", annexed to a letter of the President of the CJEC Hans Kutscher to the President of the Council Hans Dieter Genscher, of 21 July 1978. On file with the author.

The Letter of the President of the CJEC Ole Due to the President of the Council Hans van den Broek, of 17 October 1991, to which was attached a draft proposal (Projet de Décision du Conseil modifiant la Décision du Conseil du 24 Octobre 1988, instituant un Tribunal de Première Instance des Communautés Européennes). On file with the author.

Proposals submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases – Note on the effect of intellectual property cases on the budgetary requests for the year 2000. In Council doc. 8198/99.

Report of the Court of Justice on certain aspects of the application of the treaty on European Union, Luxembourg, May 1995. [https://www.cvce.eu/obj/report_of_the_court_of_justice_of_the_european_communities_luxembourg_may_1995-en-3644862f-2e8f-4170-9616-e573a41b61c5.html]

Contribution by the Court of First Instance to the 1996 Intergovernmental Conference, Luxembourg, May 1995. On file with the author.

L'avenir du système juridictionnel de l'Union européenne - Document de réflexion de la Cour de justice et du Tribunal de première instance. In Council doc. 8208/99.

CIG 2000: Contribution de la Cour de Justice et du Tribunal de première Instance à la Conférence intergouvernementale, CONFER/VAR 3964/00, 28.2.2000.

Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto In Council doc. 8787/11 of the Council + ADD 1.

Draft amendments to the Statute of the Court of Justice of the European Union and Annex I thereto – Further information concerning the proposal to increase the number of judges of the General Court. In Council doc. 12719/11.

Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto - Observations made by the Court of Justice in connection with the proceedings of the

Council's Working Party on the Court of Justice on 14 October 2011. In Council doc. 16904/2011.

Reform of the General Court of the EU − Method of appointment of additional Judges. In Council doc. 18107/13.

Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union. In Council doc. 14448/1/14.

Proposal for a Regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants. In Council doc. 14306/15.

Draft amendments to the Rules of Procedure of the General Court. In Council doc. 7068/18.

Report of the Court of Justice on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU. In Council doc. 15995/17.

Amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union. In Council doc. 7586/1/18.

National documents

E-jatkokirje "Euroopan unionin tuomioistuimen ehdotus tuomioistuimen perussäännön ja sen liitteen I muutoksiksi; yleisen tuomioistuimen tuomarien määrän nostaminen", UM2014-01470.

CASES

TABLE OF ABBREVIATIONS

CCBE	The Council of Bars and Law Societies of Europe
CFI	Court of First Instance of the European Communities
CFR	Charter of Fundamental Rights of the European Union
CJ	Court of Justice
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
CML Rev	Common Market Law Review
Coreper	Committee of Permanent Representatives
CST	Civil Service Tribunal
ECA	European Court of Auditors
ECSC	European Coal and Steel Community
ECSC Court	Court of Justice of the European Coal and Steel Community
EEC	European Economic Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EL Rev	European Law Review
Euratom	European Atomic Energy Community
GC	General Court
Ga. J. Int'l&Comp. L.	Georgia Journal of International and Comparative Law
ICLQ	The International & Comparative Law Quarterly
IGC	Inter-Governmental Conference

RTDE	Revue trimestrielle de droit européen
SEA	Single European Act
TFEU	Treaty on the Functioning of the European Union
UNTS	United Nations Treaty Series

1 Introduction

Jean Monnet stated in the first meeting of the Court of Justice of the European Coal and Steel Authority (hereinafter: the ECSC Court) on 10 December 1952 that "[f]or the first time there has been created a sovereign European Court. I foresee in it also a Supreme Federal European Court."[1] In retrospect one can ask whether the judiciary in question really was a "European Court", considering that its jurisdiction at the time only covered six countries.[2] But today, 65 years later, the Court of Justice of the European Union (hereinafter: CJEU), with its jurisdiction covering 28 European countries and a wide range of subject-matters touching the everyday life of the citizens, without a doubt is a "European Court".

The structure of this institution is flexible, as it has, unlike that of the other main institutions of the EU, been changed several times over the years in a profound manner to meet the new challenges brought by expansions of the EU's area and of its powers. The latest reform, the examination of which is at the core of this thesis, was agreed by the legislator in December 2015 and is still partly unfinished. Its background relates to the workload crisis that the General Court (hereinafter: GC) faced towards the end of the first decade of 2000. As a remedy the CJEU presented in 2011 a proposal to add the number of judges in the GC by 12. After a lengthy, cumbersome and highly politicised process the legislator together with the CJEU managed to find a compromise that consisted of a far more radical reform then the one originally proposed. The main elements of the reform are 1) the gradual doubling the number of judges at the GC by September 2019 and 2) the abolishment of the Civil Service Tribunal (hereinafter: CST).

The main purpose of this thesis is to examine this reform, in many respects quite different from the previous ones. The reform has been the subject of unprecedented criticism covering both substantial and procedural issues. Although some of the critique might be exaggerated, the inevitable conclusion is that the addition of judges was excessive and that the abolition of

[1] *Tamm (2013),* p. 18.
[2] *Tamm (2013),* p. 15.

the CST is a loss. But does this mean that the reform is doomed to be a failure or could the CJEU manage to turn it into a win? Although it is way too early to draw definitive conclusions, there are certain observations that can be made.

To this end, before making a comprehensive overview of the latest reform and the process leading to it, the sections 2 and 3 will consist of the examination of the different modifications that the architecture of the judiciary of the CJEU has undergone before the latest reform, from the establishment of the court system in 1952 until the Lisbon Treaty. The evolution of the architecture of the CJEU will be presented in a chronological order and the reasons behind the modifications as well as their impacts are examined.

The term "architecture" is used to describe the various modifications in the structure of the judiciary, such as the setting up of completely new courts and of adding the number of judges or advocates general. The most important changes in the internal organisation of the judiciary will also be presented, as they are often very closely linked to the changes in the external architecture, both in time and in substance.[3] Also, the giving of new competences to the courts as well as the important shifts of competences between the different parts of the judiciary are mentioned when they are made as a part of a reform, as these alterations often form an essential part of a reform and alter the nature of the courts in question. National courts, when applying EU law, form a part of the judicial architecture of the EU. Nevertheless, they are left outside this thesis as this thesis, revolving around the CJEU as an institution.[4] The same goes for the different boards of appeal of EU agencies and similar bodies.

Section 4 presents the legislative process leading to the adoption of the latest reform describing in detail the different twists and turns of the project, important to fully understand the reform and its background. Section 5 will focus on the evaluation of this reform, presenting first an overview of the public as well as institutional and academic discussion

[3] Changes in the internal architecture often either precede or follow changes in the external architecture or are made to avoid or to postpone them.

[4] Moreover, as the position of national courts has remained unchanged throughout the history of the court system, their inclusion in the examination would not have any added value.

surrounding the reform. The second part of this section is devoted to the examination of the possible measures that the CJEU and the GC, in particular, will have to undertake in the future as a result of the reform. Finally, the sixth and last section will present the conclusions and analyse the chances of the reform to succeed despite its shortcomings and the harsh criticism it has faced.

The thesis has been made by using official sources such as legislative acts and provisions of primary law as well as the various preparatory documents related to them. Academic literature concerning the evolution of the structure of the CJEU has also been used. However, printed and social media have also been used as sources especially regarding the latest reform. The reform process was followed closely by the EU law blogosphere as well as the press in certain countries. The commentaries presented in the media provide valuable information on the process and help assessing the legitimacy and general acceptance of the reform and give valuable information on the process. Without the use of these sources the picture painted of the reform would be one-sided and simplified.

2 From an ECSC Court to a two-level jurisdiction

2.1 The early years – from an ECSC Court to a Court of Justice of the three Communities

2.1.1 The ECSC Court

The story of what today is the CJEU started with the entry into force of the Treaty of Paris[5] establishing the European Coal and Steel Community (hereinafter: ECSC) in 1952.[6] This

[5] The Treaty was signed in Paris on 18 April 1951 and entered into force on 23 July 1952. Concluded for a period of fifty years, it expired on 23 July 2002.

Treaty provided in its Article 7 for the establishment of the ECSC Court. The other three institutions were "a *High Authority*, assisted by a Consultative Committee", "a *Common Assembly*" and "a *Special Council*, composed of ministers".

However, that the ECSC would be endowed with a Court was not self-evident. The first drafts of the so-called Schuman Plan namely provided only for a weak *ad hoc* appeal system for the ECSC and *Jean Monnet* was reluctant to the idea of creating a court.[7] Nevertheless, apparently thanks to the German delegation emerged the idea of a permanent court that could solve different types of cases between the relevant actors, including natural and legal persons and that would balance the strong High Authority.[8] And so begun the drafting of Treaty articles on the court and its jurisdiction.

According to Article 31 of the ECSC Treaty the function of the ECSC Court was "to ensure the rule of law in the interpretation and application of the present Treaty and of its implementing regulations." By creating a Court, the founders of the ECSC wanted to show and to make sure that the new Community is based on democratic principles and the rule of law; the Court represented the new, European spirit where conflicts are solved by common institutions. Hence, the ECSC Court could be seen as part of the transitional justice after the Second World War, together with the founding of for instance the European Court of Human Rights (hereinafter: ECtHR) and the Italian and German Constitutional Courts.[9]

The main responsibility was given to *Maurice Lagrange*, a member of the French *Conseil d'Etat.*[10] Hence it was natural that the judicial structure of the ECSC Court was influenced by ideas derived from French administrative law with an advocate general as an independent legal advisor, and its working methods were also modelled on the procedures of the *Conseil*

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[6] Some have questioned whether the CJEU really is a continuity of the ECSC Court or whether the current Court was only born in 1958 when the ECSC Court became the Court of Justice of the European Communities. Nevertheless, it seems clear that the establishment of the ECSC Court signified the birth of what today is the CJEU.
[7] *Arnull (2018),* p. 2.
[8] *Tamm (2013),* pp. 16−17.
[9] *Tamm (2013),* pp. 12−14.
[10] *Arnull (2018),* p. 2.

d'Etat.[11] The ECSC Court consisted of seven judges and two advocates general, appointed for six years by common agreement of the governments of the Member States from among persons of recognized independence and competence. There was one judge from every Member State, and a seventh seat necessary to avoid a tie. The first composition of the ECSC Court consisted of an Italian President, Belgian, French, German and Luxemburgish judges, two Dutch judges as well as a French advocate general and a German advocate general.[12]

The ECSC Court was competent to annul the decisions and the recommendations of the High Authority[13] and the acts of the Assembly and the Council.[14] It also had jurisdiction to assess damages against the Community and to rule on the validity of acts of the High Authority or the Council when they have been contested in litigation before a national tribunal (the latter seems to be an early form of the preliminary reference procedure). The ECSC Treaty also included an infringement procedure.[15]

The fact that the Court had (and still has) its seat in Luxembourg was more of a coincidence, as also the cities of Brussels and Liège were discussed in this context. Luxembourg was finally chosen, but only by a provisional arrangement which was not confirmed until at the Edinburgh European Council of 12 December 1992.[16]

[11] *Brown and Kennedy (2000),* p. 1, *Tamm (2013),* p. 17 and *Edward (1995),* p. 539.
[12] The curia-website [https://curia.europa.eu/jcms/jcms/p1_217426/en/].
[13] Article 33(1) of the ECSC Treaty; "on the grounds of lack of legal competence, substantial procedural violations, violation of the Treaty or of any rule of law relating to its application, or abuse of power."
[14] Article 38 of the ECSC Treaty; "on the grounds of lack of legal competence or substantial procedural violations".
[15] According to its Article 88 if the High Authority deemed that a Member State was "delinquent with respect to one of the obligations incumbent upon it by virtue of the present Treaty", it took note of the delinquency in a motivated decision after permitting the State concerned to present its views. The Member State concerned had the right to appeal this decision to the ECSC Court.
[16] The curia website [https://curia.europa.eu/jcms/jcms/P_44255/en/].

2.1.2 The Court of Justice of the European Communities is born

In 1957 the European Economic Community (hereinafter: EEC) and the European Atomic Energy Community (hereinafter: Euratom) were created by the Treaties of Rome.[17] Both new Communities were equipped with an institutional apparatus similar to that of the ECSC, including a Court of Justice.

The provisions concerning the Court of the EEC Treaty and the Euratom Treaty were somewhat more elaborate than those in the ECSC Treaty. They included a full-fledged preliminary ruling procedure with a right for all national courts (and obligation in case of highest national courts) to present preliminary references both on validity and on interpretation of Treaties and secondary legislation.[18] As is well known, this system, based on cooperation between the CJEC and the national courts became one of the cornerstones of the judicial activity of the CJEC. Another opportunity to ensure the consistency of law of the Communities and its uniform application would have been to institute a system whereby the decisions of national courts could have been applied to the CJEC. It seems clear that the system chosen, based on cooperation rather than hierarchical relation between the courts is more fruitful from the point of view of the courts, and quicker and better from the point of view of legal certainty for the litigants.

To avoid multiplication of institutions the Member States agreed on a “Convention on Certain Institutions Common to the European Communities".[19] According to this Convention a common "Court of Justice of the European Communities" (hereinafter: CJEC) replaced the Court created by the ECSC Treaty.[20] In addition to the technical articles

[17] The ECSC Treaty and the Euratom Treaty were signed in Rome on 25 March 1957 and entered into force on 1 January 1958.
[18] Article 177 of the EEC Treaty and Article 150 of the Euratom Treaty. The preliminary ruling procedure is inspired by Italian law [*Tamm (2013)*] and was based on the ideas of the Italian former legal adviser to the High Authority, *Nicola Catalano* [*Arnull (2018)*, p. 4].
[19] Signed in Rome 25 March 1957.
[20] The Convention on Certain Institutions Common to the European Communities, Articles 3 and 4. According to this Convention also the Assembly was common to all three Communities, whereas the High Authority/the Commission (the EEC and the Euratom had a Commission instead of a High Authority) as well as the Councils of the three Communities remained separate until the entry into force on 1 July 1967 of the "Merger Treaty"

necessary for the transfer of powers to the new Court, the Convention included some substantial amendments which made the requirements concerning judges and advocates general more stringent. According to the ECSC Treaty the judges only had to be "persons of recognized independence and competence", which explains why the Dutch politician *Petrus "Jos" Serrarens* and the French economist *Jacques Rueff* were able to be nominated as judges at the Court although they did not have any legal training.[21] However, the Convention stipulated that they were to be chosen among persons "whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence". This undoubtedly enhanced both the legal capacity and the credibility of the CJEC.

2.2 The architecture starts to develop – towards a more elaborate court system

2.2.1 The increasing workload of the CJEC

For the first decades the workload of the CJEC stayed reasonable, and the story tells that the first preliminary reference was greeted with the popping of champagne.[22] The case load grew relatively slowly, and during the 1950's and the 1960's the CJEC only rarely had to deal with more than 50 cases per year.[23] However, after the first two decades the number of new cases turned to a sharp increase. There are various reasons for this trend, such as the general increase in the volume of new Community legislation, the first enlargement[24], as well as the increased willingness of national courts to make preliminary references. Whereas in 1963 there were 6 preliminary references, ten years later the corresponding figure had risen to 61.[25]

(signed in Brussels on 8 April 1965). According to the Merger Treaty the Commission of the EEC and the Council of the EEC replaced the Commission and Council of Euratom and the High Authority and Council of the ECSC.

[21] See *De Waele (2015)*, pp. 24–25.

[22] *Arnull (2006)*, p. 25.

[23] *Brown and Kennedy (2000)*, Table 1 at Appendix II, p. 420.

[24] Denmark, Ireland and the United Kingdom in 1973.

[25] Statistical information of the Court of Justice (1997), p. 19.

In 1973 the CJEC had to deal with a record number of 192 new cases in total, out of which as many as 100 were staff cases (the previous year there had been only 82 cases in total).[26] As a consequence, the CJEC started for the first time to advocate for a second court to share its workload and, by doing this, planted the seeds for the development of the judiciary from a single court to a multi-layered court system. However, as the following sections will explain, it took one failed attempt and fifteen years of time before this became a reality.

2.2.2 The first attempt to create an Administrative Tribunal

The sudden and sharp increase in the number of staff cases lead the CJEC to act promptly. In 1974 the sitting and former Presidents of the CJEC, Lord *Mackenzie Stuart* and *Robert Lecourt* appeared in person before the Council and asked for the establishment of an administrative tribunal to deal with staff cases. The proposal was also presented in a letter of the CJEC of 22 July 1974.[27]

However, the other institutions did not seem to be convinced of a pressing need to reform the court system, as it took four years before the Commission, following an invitation made by the Council, issued a proposal for a Regulation establishing an "Administrative Tribunal of the European Communities".[28] At the time there was no explicit legal basis for the establishment of new tribunals in the Treaties, but the Commission based, as suggested by the CJEC itself[29], its proposal on Article 179 of the EEC Treaty according to which "[t]he Court of Justice shall be competent to decide in any case between the Community and its employees, within the limits and under the conditions laid down by the relevant statute of

[26] Statistical information of the Court of Justice (1997), p. 18
[27] *Kennedy (1989),* p. 9.
[28] Proposal for a Council Regulation (Euratom, ECSC, EEC) amending the staff regulations of officials and conditions of employment of other servants of the European Communities and establishing an administrative tribunal of the European Communities, COM/1978/395/CNS, OJ C 225, 22.9.1978, p. 6. See, *Kraemer (2009),* p. 1875.
[29] *Kennedy (1989),* p. 9.

service or conditions of employment." In concrete terms the establishment of the new tribunal was to be made by amending the Staff Regulations.

In retrospect one can question whether it would have been legally feasible to establish a new tribunal based only on secondary legislation. However, this dilemma did not have to be solved because the new tribunal never saw daylight. Apparently, the reason for this was that agreement could not be reached on the question of whether this tribunal should be of a mainly judicial or of a mainly administrative character.[30] Thus, the CJEC continued for another decade to deal with all cases at first and last instance.

Even though this failure must have been a disappointment to the CJEC, it seems that finally the worst-case scenario did not materialize. After the exceptional year 1973 the number of staff cases dropped back to some 20-30 per year[31] and in addition, at least a temporary relief for solving the workload of the CJEC was offered by the expansion of the CJEC by two new judges and two new advocates general following the first enlargement in 1973 (Denmark, Ireland and the United Kingdom). After this enlargement there was one judge from each Member State as well as four advocates general, one from each of the "large Member States" (France, Germany, Italy and the United Kingdom).[32]

2.3 The birth of the Court of First Instance

Even though the effort described above was the first official attempt to create a second layer to the Community judicature, the roots of the CFI properly speaking can be traced back to 1978 when the CJEC issued a memorandum[33] in which it drew the attention of the Council to certain measures it considered necessary to maintain the quality and effectiveness of its work. The CJEC referred to its increasing workload and pointed out that the future accessions of

[30] *Schermers (1988),* pp. 542−543.
[31] *Brown and Kennedy (2000),* p. 420.
[32] *Brown and Kennedy (2000),* p. 71.
[33] "Mémorandum de la Cour sur les mesures qu'elle juge nécessaires aux fins de son fonctionnement actuel et futur", annexed to a letter of the President of the CJEC Hans Kutscher to the President of the Council *Hans Dieter Genscher*, of 21 July 1978.

Greece, Spain and Portugal as well as the entry into force of several Conventions attributing competences to the CJEC would aggravate the problem. The CJEC presented several proposals for measures aimed at alleviating the problem (such as adding the number of judges and advocates general and approving certain amendments to its Rules of Procedure). The CJEC also reiterated its request for the immediate establishment of a staff tribunal and suggested that also some other categories of cases brought by private persons, such as those related to competition, could be subject to similar arrangements.

The CJEC recognised that this would necessitate a Treaty amendment, which could, according to the memorandum, be made in connection with the next accession. The advantages of such a structural reform were underlined, stating that it would bring the judicial system of the Communities closer to Member States and confer the CJEC the function of judge of law instead of judge of facts ("*la fonction de juge de droit à l'exclusion de celle de juge de fait*"). As with the abovementioned initiative of the CJEC of 1974, the other institutions did not rush into modifying the Court system. Only the proposals related to amending the Rules of Procedure were acted upon immediately, but the other proposals seemed to be ignored by the legislator.[34]

However, the workload of the Court continued its sharp increase. Whereas in 1970 the number of new cases was 79, in 1980 it had more than tripled to 279.[35] Although the capacity of the CJEC grew when enlargements brought more judges and advocates general[36] and other personnel was reinforced, the effects of these measures were quickly absorbed by the flow of new cases brought by accessions, as well as, more indirectly, the added complexity caused by having to deal with yet more languages and more national legal cultures. The stock of pending cases kept growing and, subsequently, the time taken by the proceedings lengthened steadily. For instance, in case of preliminary rulings, whereas the average time taken by the

[34] With the Greek accession in 1981 the number of judges was increased from 9 to 11 and the number of advocates general from 4 to 5, and in 1986 the acts of accession of Spain and Portugal raised the number of judges to 13 and that of advocates general to six. See *Kennedy (1989)*, p. 12.
[35] Statistical information of the Court of Justice (1997), p. 18.
[36] The number of legal secretaries assisting the judges and the advocates general was raised from two to three in 1986. *Brown and Kennedy (2000)*, p. 71.

CJEC to hand down a ruling was six months in 1975, in 1984 it had more than doubled up to 14 months.[37] Many commentators were of the opinion that the maximum time for getting a preliminary ruling should be around 12 months, claiming that forcing the national courts to suspend their proceedings for a longer time was hard to reconcile with the obligations of Member States under the ECHR.[38]

The constantly lengthening handling times worried not only the CJEC itself but also the commentators.[39] According to *Schermers*, "to any observer it is clear that the work-load of the Court of Justice is too heavy".[40] The CJEC was in particular concerned about the potential effect that this trend might have to national courts, rendering them reluctant to make preliminary references – the core element of judicial remedies in the Community and "the instrument of integration *par excellence"*.[41] This in turn would undermine the role of the CJEC and jeopardize the uniformity of Community law. On the other hand, the complex cases related to competition and anti-dumping required very detailed and time-consuming examination of facts, which was not possible because of the heavy workload and the stress related to keeping the handling times reasonable. The need for a structural solution became more and more pressing.

2.3.1 The Single European Act and a legal basis for the establishment of a CFI

Every student of European law knows by heart that the first major revision of the Treaties, the Single European Act[42] (hereinafter: SEA) of 1986 provided for the completion of the internal market by the end of 1992. A less known fact is that the SEA also added to the

[37] See e.g. *Millet (1989),* p. 833.
[38] See e.g. *Millet (1989),* p. 812, *Van Gerven (1996),* p. 219 and *Dyrberg (2001),* p. 293.
[39] *Millet (1989)*, pp. 811−813.
[40] *Schermers (1988),* p. 542.
[41] *Jacqué and Weiler (1990),* p. 187.
[42] Signed in Luxemburg on 17 February 1986 (by the nine Member States) and in the Hague on 28 February 1986 (Denmark, Italy and Greece), and came into force on 1st July 1987.

Treaties a legal basis that made it possible for the Council to establish the Court of First Instance of the European Communities (hereinafter: CFI).

The SEA was prepared by the Inter-Governmental Conference (hereinafter: IGC) of 1985-1986.[43] The CJEC took the initiative once again and sent to the Council a letter explaining the difficult situation it was facing and, to make things as simple as possible, annexed draft proposals for Treaty provisions enabling the establishment of a CFI.[44] According to the letter the number of preliminary references on the one hand, and those of complex cases related to competition, state aids, anti-dumping and steel production on the other, had grown rapidly, which had resulted to constantly lengthening handling times. The CJEC warned the Council that this might in the medium term affect seriously the effectiveness and the quality of the judicial control in the legal order of the Communities. To solve the problem, the CJEC proposed adding to the Treaties a legal basis allowing the establishment by the Council of a court with jurisdiction to hear cases involving examination of complex factual situations as well as cases of minor importance. This would, according to the letter, allow the CJEC to concentrate its efforts on its essential task of securing the respect of law in the application and interpretation of the Treaties.

The draft articles proposed by the CJEC were not controversial. The only problem seemed to be related to the fact that IGC had been convened only to examine changes proposed to the EEC Treaty, whereas the legal basis proposed by the CJEC had to be added also in the Euratom Treaty and the ECSC Treaty. Nevertheless, the Luxembourg presidency managed to overcome this legal-institutional problem[45] and hence, the final version of the SEA empowered the Council (unanimously at the request of the CJEC and after consulting the Commission and the European Parliament) to "attach to the Court of Justice a court with jurisdiction to hear and determine at first instance, subject to a right of appeal to the Court of Justice on points of law only and in accordance with the conditions laid down by the Statute,

[43] The IGC opened on 9 September 1985 and closed on 28 February 1986.
[44] Letter of 8 November 1985 from the President of the CJEC, Lord *Mackenzie Stuart* to President of the Council, *Jacques F. Poos.*
[45] See *Kennedy (1989)*, p. 14.

certain classes of action or proceeding brought by natural or legal persons".[46] It was expressly stipulated that the new court shall not be competent to hear and determine actions brought by Member States or by institutions or questions referred for preliminary ruling.

2.3.2 The establishment of a Court of First Instance

The SEA entered into force on 1st July 1987, and already in September of the same year the CJEC, determined to have the new court established as soon as possible, forwarded to the Council a formal request for the establishment of the CFI, along with drafts for the legal texts necessary and a memorandum concerning the budgetary implications.[47] The CJEC motivated in its explanatory note the proposals by stating, first, that especially for cases involving examination of complex facts the establishment of a two degree jurisdiction will enhance the legal protection of individuals. Secondly the CJEC referred to its lengthening handling times and heavy workload, that is hard to reconcile with the requirements of a proper administration of justice and risks compromising the ever so important preliminary reference procedure.

Even though it has been speculated that the Council at first did not seem particularly eager to create the new court[48] the legislator handled the proposal promptly and the Decision 88/591 establishing the CFI[49] was published in the Official Journal in November 1988, only a little more than a year after the launching of the official proposal. However, in the course of the legislative process the original proposal went through some quite significant changes, the most important of which related to the composition and the jurisdiction of the CFI.

[46] The new Article 32d of the ECSC Treaty, the new Article 168a of the EEC Treaty and the new Article 140a of the Euratom Treaty.
[47] Letter of 29 September 1987 from the President of the CJEC, Lord *Mackenzie Stuart*, to the President of the Council *Uffe Ellemann-Jensen*.
[48] *Schermers (1988),* p. 542.
[49] Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities, OJ 1988 L 319, p. 1.

As to the composition, the CJEC had proposed a moderate seven-member court, sitting in two chambers of three judges. Nevertheless, the Council opted for a bigger court consisting of 12 members. This number, conveniently equal to the number of Member States at the time, had been suggested by both the European Parliament[50] and the Commission.[51] Also, the possibility to call upon one of the members to act as advocate general was mentioned.[52] As to the institutional status of the new court, Article 1 of the Decision 88/591 stipulated that the CFI shall be "attached to" the CJEC and that its "seat shall be" at the CJEC. Thus, the CFI was clearly not independent but ancillary to the CJEC. The Commission had even suggested a system in which judges of the CJEC would have to be consulted with respect of the appointments proposed for the CFI by the Member States, obliged each time to propose twice as many candidates as there as posts to be filled.[53] However, this proposal did not gain enough success.

As regards jurisdiction, the legal basis stipulated in a general manner that the competence of the CFI could cover "certain classes of action or proceeding brought by natural or legal persons". The CJEC chose to suggest the transfer to the CFI of the competence on a few quite limited areas, namely actions brought by natural or legal persons concerning staff cases as well as competition and anti-dumping cases and coal and steel cases arising from the application of the ECSC Treaty. During the years 1953-1987 staff cases had represented 25,2 % of all cases decided by the CJEC[54], so in numeral terms their transfer represented a considerable relief for the CJEC, even if substance-wise they rarely were complicated. However, the legislator opted for an even narrower field of competence and dropped anti-dumping and anti-subsidy cases outside the Decision 88/591, as suggested by the

[50] Legislative resolution of the European Parliament, adopted at its sitting of 17 June 1988, OJ C187/223.
[51] Establishment of a Court of First Instance. Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council decision establishing a Court of First Instance (CFI) and amending the statutes of the Court of Justice, SEC(88)366 final, 18 May 1988, p. 6 and the supplementary document, SEC(88)1121 final, 20 July 1988.
[52] The Commission suggested that the role of the advocate general should be institutionalized (preliminary guidelines of the Commission p. 5 and the supplementary comments, p. 4).
[53] Preliminary guidelines of the Commission, p. 6 and the supplementary document, p. 3. See also *Vandersanden (1991),* p. 54.
[54] *Vandersanden (1991),* p. 56.

Commission in its opinion[55] as well as by France.[56] They motivated their position by stating *inter alia* that the decision making procedure related to these matters was already too cumbersome to justify a double level of judicial control, that the jurisprudence concerning these questions was not sufficiently developed for them to be transferred to the new court and that the political and financial interests related to these cases is such that almost all judgements must be expected to be subject to appeal to the CJEC.[57]

2.3.3 The new Court of First Instance in action

In October 1989 the CFI started to function. The choice made by the legislator regarding field of competence of the CFI, narrowed down compared to the proposal, was widely regretted and received critique not only from the CJEC but also from commentators who described the transfer of jurisdiction to be of an "overly limited nature"[58] and the limitations to be "[i]n the light of the objectives of the establishment of the Court of First Instance […] particularly regrettable".[59] Hence, it was predicted that although the establishment of the CFI would admittedly have a positive impact on the CJEC's workload, it will not be "an infant prodigy" solving all of its problems.[60] However, leaving the question on the competence aside, one can say that the decision founding the CFI was received in a very positive spirit.

Some acknowledged that in the beginning the CFI, considering that the number of judges was relatively large and yet the field of competence quite limited, was a bit overstaffed. Nevertheless, this was not necessarily seen as a disadvantage. *Schermers* was confident that workload of the CFI would soon grow to fit the number of judges and stated that "it is good for a growing child to buy clothing somewhat larger than absolutely necessary".[61] In a similar vein, *Kennedy* thought that it was probably advantageous that the CFI would have a "period

[55] Preliminary guidelines of the Commission, pp. 3−4
[56] *Millet (1989)*, pp. 820−821 and *Vandersanden (1991)*, p. 57.
[57] Preliminary guidelines of the Commission, pp. 3−4. See also *Arnull (1994)*, p. 300.
[58] *Vandersanden (1991)*, p. 58.
[59] *Kennedy (1989)*, p. 23.
[60] *Van Ginderachter (1989)*, p. 5.
[61] *Schermers (1988)*, pp. 546−547.

during which to cut its judicial teeth, to develop its own procedures and to establish its own reputation".[62]

In practice the CFI was for the first years of its existence very much a civil service tribunal, staff cases forming a clear majority of its case load.[63] Both the quality of the judgments of the CFI and its success in improving judicial review of complex facts were generally acknowledged[64], although according to some commentators it concentrated even a little bit *too* meticulously on the examination of facts.[65]

The CFI quickly became a natural and intrinsic part of the judicature of the Communities, and it was praised *inter alia* of having narrowed the gap between the Community and its citizens.[66] The improvement of legal protection it brought to natural and legal persons followed on the one hand from the fact that the CFI was able to examine more thoroughly than the CJEC the facts of the case, and on the other from the existence of two levels of jurisdiction.

[62] *Kennedy (1989),* p. 29.
[63] *Kraemer (2009),* p. 1876 and *Kanninen (2006),* p. 293. For instance, in 1991 out of 95 new cases 81 were staff cases. See *Arnull (1994),* p. 301.
[64] See e.g. *Arnull (2006),* pp. 138−139 and *Brown and Kennedy (1994),* p. 374.
[65] *Van der Woude (1992),* pp. 468−469.
[66] Speech of *Jean-Luc Dehaene* in the seminar "From 20 to 2020 – Building the CFI of tomorrow on solid foundations".

3 The court system becomes three-tier

3.1 The situation after the creation of the CFI

In his letter of 1991 the President of CJEC *Due*, acknowledging the quality of work done by the CFI, stated that it had "*fait ses preuves en tant que jurisdiction dans l'ordre juridique communautaire*"[67] asked the Council to extend its jurisdiction. The initiative of the CJEC was acted upon and by Council Decisions made in 1993 and 1994 the jurisdiction of the CFI was extended to hearing and determining not only cases concerning anti-dumping and subsidies but virtually all actions brought by natural or legal persons.[68] The current President of the GC, *Marc Jaeger*, has stated that the day of the adoption of the Decision of 1993 should be regarded as a "red-letter day" in EU judicial history, because on this day the CFI became the sole and unique interlocutor for individuals and the business world and thus, a "general court" instead of a special one.[69] This was a very welcome development for many reasons, not least because experience had shown that the initial field of competence of the CFI had been not only narrow but also unclear and apt to cause problems of interpretation.[70] With the entry into force of the Treaty of Maastricht[71], 1993 was also the year when the Treaty Article concerning the CFI was amended from a mere legal basis to a genuine institutional provision fixing the constitutional status of the CFI as part of the judicial architecture.[72]

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[67]The Letter of the President of the CJEC *Ole Due* to the President of the Council *Hans van den Broek*, of 17 October 1991, to which was attached a draft proposal (Projet de Décision du Conseil modifiant la Décision du Conseil du 24 Octobre 1988, instituant un Tribunal de Première Instance des Communautés Européennes).

[68] Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1993 L 144, p. 21. On anti-dumping and anti-subsidy cases, Council Decision 94/149/ECSC, EC, of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities, OJ 1994 L 66, p. 29.

[69] *Jaeger (2017)*, p. 8.

[70] See *Van der Woude (1992)*, p. 414.

[71] The Treaty of Maastricht was signed on 7 February 1992 and it entered into force on 1 November 1993.

[72] Article 32d of the ECSC Treaty, Article 168a of the EEC Treaty and Article 140a of the Euratom Treaty. The Maastricht Treaty also made it possible to expand the competences of the CFI by permitting the transfer under

Nevertheless, statistics showed clearly that the establishment of the CFI had not had the desired effect of liberating the resources of the CJEC for it to concentrate on its core tasks.[73] The total number of new cases coming to the CJEC kept growing almost at the same rate as before the establishment of the CFI, and even if there was for a short moment a temporary relief offered by the transfer of a bloc of pending cases to the CFI, it was quickly compensated by the rise in the number of both preliminary references and appeals from the judgments of the CFI. There were various reasons for this trend, such as *inter alia* the increased awareness of lawyers and the public of Community law, the intensified harmonisation related to the completion of the single market following the SEA and the expansion of areas over which the CJEC has competence, as well as the accessions of Spain and Portugal in 1986. Naturally also the new languages added the burden of translation services and thus added to the lengthening of handling times.

3.2 The claims for a further reform start to rise

In the course of the 1990's it became clear that the excessive length of proceedings was a fact[74] and the claims for a further reform started to increase. Little by little also the quality of the judgments of the CJEC started to be criticised. The CJEC was accused *inter alia* of insufficient examination of facts and of "lack of mature reflection"[75] as well as of overlooking the practical implications of its judgments and of "extreme laconicism".[76] According to a test introduced by *Arnull* in an article published in 1994 an efficient court is one which "within a reasonable period of time, gives just and intellectually compelling

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its jurisdiction of all direct actions (instead of only those brought by natural and legal persons). However, this transfer of competences would have required a change of the Statute, which was made only much later, on the basis of the Nice Treaty.

[73] Of course, the work load situation would have been much worse without the establishment of the CFI. See, *Vesterdorf (1992),* pp. 904−905.

[74] See e.g. *Brown and Kennedy (1994),* p. 361, *Voss (1993),* p. 1119 and "The role and future of the European Court of Justice", A report by Members of the EC Section of the British Institute's Advisory Board, p. 1.

[75] See e.g. *Jacqué and Weiler (1990),* pp. 188−189 and *Arnull (1994),* pp. 297−298.

[76] "The role and future of the European Court of Justice", A report by Members of the EC Section of the British Institute's Advisory Board, p. 95.

decisions".[77] Both the writer himself and other commentators doubted whether the judiciary of the Communities still passed this test this and would be able to pass it in the future.[78]

Different ideas on how to maintain the effectiveness and the quality of the Community judicature kept flowing. The suggestions covered a wide range of potential solutions, stretching from different modifications in the respective areas of competence of the two courts[79] and adding the number of judges in one or both of the courts[80] to more radical upheavals of the judicial architecture. *Jacqué* and *Weiler* proposed in their famous article published as early as in 1990 a judiciary consisting of a European High Court of Justice and four Regional Courts.[81] *Van Gerven,* on the other hand, suggested transforming the CFI into a court of general jurisdiction and creating alongside it several specialised first instance courts, located somewhere else than Luxembourg.[82] The creation of a Staff Tribunal with appeals on points of law to the CFI or alternatively increasing the size of the CFI were also brought up.[83]

3.3 The Treaty of Amsterdam – the missed opportunity

With the IGC leading eventually to the Treaty of Amsterdam[84] approaching in 1996 there seemed to be a perfect momentum for Treaty changes. Nevertheless, the questions relating to the architecture of the judicature never ended up on its agenda. The obvious reason for this

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[77] *Arnull (1994),* p. 297.
[78] See also *Scorey (1996),* p. 224.
[79] *Arnull* proposed the transfer to the CFI of certain actions brought by Member States [*Arnull (1994),* 304-307] and *Voss* was of the view that the interpretation of directives and regulations was not a task to be loaded of the CJEC but should be transferred to the CFI [*Voss (1993),* p. 1126].
[80] *Voss (1993),* p. 1199 and p. 1126.
[81] See *Jacqué and Weiler (1990).*
[82] *Van Gerven (1996),* p. 218. Similarily, see *Brown* and *Kennedy* who in their book brought up the idea of creating more first instance courts, each with their specific area of jurisdiction such as a customs court and a social security court. See *Brown and Kennedy (1994),* p. 366.
[83] "The role and future of the European Court of Justice", A report by Members of the EC Section of the British Institute's Advisory Board, 30-39 ("study of measures adopted so far to improve the efficiency of the Court of Justice").
[84] Signed on 2 October 1997 and entered into force on 1 May 1999.

was that despite the worries expressed and suggestions presented by helpful commentators, the courts themselves did not see the necessity for structural changes at that point, although the workload kept rising and the courts of the latest additions, Austria, Finland and Sweden (in 1995), generated more preliminary references than expected.[85] They preferred to wait until both Community courts were settled with their respective areas of competence after the transfers of jurisdiction of 1993 and 1994 from the CFI to the CJEC and to make some adjustments to their working methods before considering any radical changes to the structure of the judiciary. This position comes clear from their reports of May 1995 to the Study Group preparing the work of the IGC of 1996.[86]

In its report the CJEC stated that the creation of the CFI has indeed "afforded great protection to individuals and enabled the CJEC to devote itself more fully to its essential task of ensuring the uniform application of the law, under conditions which preserve the quality and efficiency of the judicial system". The CJEC admitted being aware of the need to reduce the time taken to deal with preliminary references, which it described as the "veritable cornerstone of the internal market" and stressed the importance of this system remaining open for all national courts.[87] The CJEC was confident that the recent transfer to the CFI of jurisdiction in all direct actions brought by individuals should allow it to cut down the handling times. Nevertheless, the CJEC indicated its willingness to examine solutions such as the chambers of the CFI becoming specialised or the new specialised Community courts being established, if this proved necessary in the future.

The CFI gave its own, independent report to the Study Group. The report expressed the concern of the CFI over the risks of its workload increasing heavily in the coming years and referred to the absolute necessity of adding the number of judges as well as the benefits of

[85] See *Craig (2001),* pp. 183−184, *Voss (1993),* p. 1119 and *Naômé (2008),* pp. 102−103.
[86] "Report of the Court of Justice on certain aspects of the application of the treaty on European Union" and "Contribution by the Court of First Instance to the 1996 Intergovernmental Conference", both Luxembourg, May 1995.
[87] Thus, the CJEC implicitly rejected the idea of limiting the right to make references to higher national courts. See *Arnull (1995),* p. 604.

setting up specialised chambers (not requiring Treaty changes).[88] Nevertheless, the CFI did not find it necessary to amend the structure of the judicature at this point.[89]

As a result, the Amsterdam Treaty was even less interesting from the point of view of the structure of the judicial apparatus of the European Union than the Treaty of Maastricht a few years earlier. Even the name of the judiciary remained "Court of Justice of the European Communities", despite the creation of the European Union.[90]

3.4 Time for big reforms – The Treaty of Nice

In 1999 the average length of giving a preliminary ruling had lengthened to 21,2 months[91] and the risk of national courts turning their backs on the system seemed more and more realistic. The President of the Supreme Administrative Court of Finland, *Pekka Hallberg* stated in a conference held in Helsinki in 1999 that one of the main reasons behind the relative passivity of his court in the field of preliminary references was the fact that it simply takes too long to get a ruling.[92] Also *Torkel Gregow* from the Supreme Court of Sweden referred to similar problems.[93] On a similar vein, in the same conference Sir *Nicholas Forwood* QC who represented the Council of Bars and Law Societies of Europe (hereinafter: CCBE) and spoke from the point of view of practitioners confirmed that the delay in getting a preliminary ruling affects the advice that a lawyer gives to his client on whether to raise a Community law point as part of his defence or not.[94]

The situation was made especially alarming by the fact that the next, by far the biggest enlargement in the history of the union was on its way. The enlargement would naturally add the number of incoming cases, but also gravely aggravate the problems related to translation,

[88] The report of the CFI, p. 5-7.
[89] The report of the CFI, p. 4-5.
[90] The name was only changed by the Lisbon Treaty in 2009.
[91] Statistics of judicial activity of the Court of Justice 1999.
[92] In *Sundström and Kauppi (1998),* p. 112.
[93] *Ibid.,* p. 253.
[94] *Ibid.*,p. 189.

which had already become a serious bottleneck and thus, one of the most important reasons behind the excessive handling times.[95]

What were the reasons behind the ever-growing workload? In addition to the usual explanations related to the enlargements and the expansion of the scope and quantity of legislation[96] there were also other, more complex ones. GC Judge *Meij* was of the view that the lengthening handling times were not attributable only to a bigger number of new cases but also to the fact that cultural differences, translation and interpretation as well the research of cases representing fifteen different legal backgrounds seriously restricted the production capacity of both courts.[97] On a more political and sociological note *Arnull* submitted that behind the increasing case load lay also the loss of the original homogeneity of Member States and the fact that the people of Europe had become more critical towards the political and legal institutions and thus, more litigious.[98] According to *Rasmussen*, on the other hand, one of the reasons behind the popularity of the CJEC was its activism; as long as the CJEC would continue its "law-making and policy-making activities", parties before national courts would consider it worthwhile trying persuade it to making some new law which will benefit their cause. He also blamed the CILFIT judgment[99] for rendering the preliminary reference procedure a magnet for unnecessary cases and stated that the one judge per Member State principle risked turning the plenary into a deliberating assembly and thus, was harmful to the efficiency of the CJEC.[100] Something had to be done, or else the preliminary reference procedure and, subsequently, the unity and consistency of community law were at risk.[101]

As regards the CFI, its workload problems were related in particular to the arrival of the first wave of appeals brought against decisions of the Boards of Appeal of the Office for

[95] See e.g. *Brown and Kennedy (2000),* p. 385 and *Rasmussen (2000),* p. 1095.
[96] *Geelhoed (2005),* p. 400.
[97] *Meij (2000),* p. 1040. This is also why, according to Meij, Community courts cannot be compared to national courts when assessing the workload.
[98] *Arnull (1999),* pp. 516−517.
[99] Case 283/81, *CILFIT.*
[100] *Rasmussen (2000),* p. 1082.
[101] See e.g. *Rasmussen* in the Hanasaari conference, *Sundström and Kauppi (1998),* p. 140.

Harmonisation in the Internal Market concerning trademarks and designs.[102] As it was expected that the number of these appeals would grow in the future, the courts submitted to the Council a proposal for adding to the composition of the GC six extra judges.[103] However, even though in principle this proposal was supported, it did not fly as the Member States were not able to decide how to distribute the posts of extra judges among themselves.[104] As will be explained later in section 4, this was indicative to the problems that the reform proposal of 2011 would face.

3.4.1 The Intergovernmental Conference of 2000

The IGC of 2000 (eventually leading to the Nice Treaty) presented a perfect opportunity for modifying the architecture of the CJEC, the whole purpose of this project being to reform the institutional structure of the EU to endure the next big enlargement (also bearing in mind that the making of any Treaty changes would be far more difficult with eight, ten or more new Member States).

This time also the courts themselves were convinced of the need to find a solution of an institutional nature to tackle the problems. Time had shown that the additional transfers of jurisdiction from the CJEC to the CFI in 1993−1994 and the internal measures aimed at making the working methods of the two courts more effective were not sufficient to allow the courts to deal in a satisfactory way with their ever-increasing workloads. Thus, the two courts (together this time) issued a reflection paper that was presented to the Ministers of Justice in May 1999.[105] The paper begun by alerting the Council to a dangerous trend towards a

[102] Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ 1994 L 11, p. 1. See also the Annual Report of 1999, Proceedings of the Court of First Instance, p. 2.
[103] Proposals submitted by the Court of Justice and the Court of First Instance with regard to the new intellectual property cases – Note on the effect of intellectual property cases on the budgetary requests for the year 2000. Doc. 8198/99, 10.5.1999.
[104] See, the answer of President of the CFI, *Bo Vesterdorf*, to the question (Q389) addressed to him in the House of Lords European Union Committee (An EU Competition Court: report with evidence, 15th report of session 2006-07).
[105] L'avenir du système juridictionnel de l'Union européenne - Document de réflexion de la Cour de justice et du Tribunal de première instance, Council doc. 8208/99 of 11 May 1999.

structural imbalance between the volume of incoming cases and the capacity of the system.[106] As a quick cure the report identified a series of concrete measures that would be executable by simple modifications of their Rules of Procedure, the Statute or the Treaties. Nevertheless, the courts underlined that finding a sustainable solution for the problems required thorough examination of the role and the structure of the community judiciary. In this vein, they presented general considerations concerning the future of the judiciary. The report mentioned as possible elements changes in the composition of the court (*inter alia* raising the number of judges in the CFI), further transfers of competences from the CJEC to the CFI and different modifications of the preliminary reference procedure. When the IGC started, the CJEC and the CFI also repeated the same proposals in an official contribution, along with proposals for concrete Treaty amendments.[107]

The Commission wanted to take part of this project and gave the task of brainstorming ideas to the "Working Party on the Future of the European Court of Justice"; a group of seven "wise men" presided by (then former) President *Due*. The mission of this group was to "review the various possible courses which may be taken in order to maintain the quality and consistency of case law in the years to come, bearing in mind the number and present duration of proceedings and foreseeable developments, in particular in light of new jurisdiction conferred upon the Court by the Amsterdam Treaty and the forthcoming enlargement."[108]

This Working Party produced a report[109] (generally known as "the Due report") that drew attention to three phenomena that evidenced "a serious crisis in the current court system of the Communities"; 1) the steady rise in the number of cases brought before the two Community courts, 2) the inadequate number of cases terminated in relation to the number of

[106] According to the report the situation was already alarming especially as regards preliminary references, and the entry into force of the third phase of the EMU, the Treaty of Amsterdam and certain conventions in the area of the third pillar as well as the incoming enlargement risked causing a considerable rise of the number of new cases (pp. 7−8).
[107] CIG 2000: Contribution de la Cour de Justice et du Tribunal de première Instance à la Conférence intergouvernementale, CONFER/VAR 3964/00, 28.2.2000.
[108] The Due report, p. 1.
[109] Report by the Working Party on the future of the European Communities' court system. January 2000.

new cases brought, and 3) the lengthening of the time taken by proceedings. Considering these trends, the Report included several long-term proposals intended to show what the court system could be like in fifteen years. The most interesting proposals from the point of view of the architecture of the judicature concerned the creation of specialist tribunals. The Working Party proposed that an "interinstitutional complaints tribunal" be set up immediately to deal with staff cases as a judicial body of first instance.[110]

However, despite this extensive groundwork it was uncertain whether the CJEC would end up in the agenda of the IGC at all. And when it finally did, it seemed that the proposals concerning the judicature did not get the attention they deserved and risked falling into oblivion, all the attention being focused on the reforms of the political institutions (such as the weighing of votes in the Council and the size and the composition of the Commission in the enlarged union).[111] This worried the CJEC up the point of the President *Rodriguez Iglesias* publishing in the French newspaper *Le Monde* an article pleading for attention to the indispensable reforms of the CJEC identified in its contribution to the IGC.[112]

In passing, it can be noted that not everyone was convinced that the proposals made by the courts and the Due group in their reports went to the right direction. *Rasmussen* stated in his critical article in 2000[113] that the reform should concentrate on the preliminary reference procedure which was at the core of the problem. He made several alternative proposals aimed at either limiting the number of references or dividing the workload caused by them between the two courts. He strongly accused both the courts and the Due Working Party for being too modest and prudent in their proposals and for burying their heads in the sand.[114]

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[110] The Due report, pp. 30−31.
[111] *Meij (2000),* p. 1039 and *Johnston (2001),* p. 500.
[112] *Rodriguez Iglesias (2000b).* He also published an article resuming the proposals made by the two courts in their contribution. *Rodriguez Iglesias (2000a).*
[113] *Rasmussen (2000),* pp. 1071–1112.
[114] *Rasmussen (2000).*

3.4.2 The Nice Treaty

Despite the fears of the CJEC the judicial system was not forgotten and the Nice Treaty[115] did introduce many significant changes to the provisions concerning the CJEC. The formulation of the relevant Treaty provisions was prepared by a special "Friends of the Presidency" group consisting of legal experts from the Member States and the EU institutions.[116] The new provisions provided for several possibilities to alleviate the workload situation in both courts. The common feature of the amendments made in the Treaties by the Nice Treaty was their flexibility. Rather than reforming the system the authors of the Nice Treaty built the basis for future changes by making to the Treaties amendments which opened the possibility for the legislator to make the changes in deemed necessary, according to its own judgement.

First, the Nice Treaty introduced a legal basis for the creation of the so called judicial panels (later, special tribunals), "to hear and determine at first instance certain classes of action or proceeding brought in specific areas" (Article 225bis). In declaration No 16 annexed to the Nice Treaty the Conference asked the CJEC and the Commission to swiftly draft a decision establishing a judicial panel which has jurisdiction to deliver judgments at first instance on staff disputes.[117]

Secondly, the Treaty provided for the possibility to raise the number of judges in the CFI superior to the number of Member States.[118] As to the CJEC, the one judge per Member State principle was finally expressly codified to the Treaties.[119]

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[115] The Treaty of Nice was signed on 26 February 2001 and came into force on 1 February 2003.
[116] *Johnston (2001)*, pp. 500−501.
[117] First of the possible fields identified in the Due report for special treatment was staff cases (the Due report, p. 30). Intellectual property cases, judicial cooperation in civil matters, Title VI of the Union Treaty on cooperation in the fields of police and home affairs and Title IV on visas, asylum and immigration, as well as competition cases were also listed as possible areas.
[118] According to the first paragraph of the new Article 224, "[t]he Court of First Instance shall comprise at least one judge per Member State. The number of judges shall be determined by the Statute of the Court of Justice".
[119] The CJEC had not presented strong views on the number of judges, considering it to be a political question. Nevertheless, President *Rodriguez Iglesias* had pointed out that a significant augmentation of the number of judges of the CJEC risked transforming the plenary from a judicial collegiate body into a deliberative assembly.

Thirdly, the new provisions erased the rule according to which the GC could only handle actions raised by (private and legal) persons and broadened the potential scope of competence of the GC in a remarkable manner. Before the Treaty of Nice the division of competences between the two courts could be resumed so that the CFI was responsible for administrative cases, brought by individuals against acts that concerned them directly and individually, whereas the CJEC acted as an appeals court as well as the constitutional court responsible for cases brought by Member States and institutions, having in principle general and abstract implications.[120] By the Nice Treaty this logic was abolished and the rule concerning the division of competence between the two courts was reversed so that in almost all direct actions the main rule was the jurisdiction of the CFI.

Thus, after little bit less than 25 years of existence the CFI had transformed from a special court working on a few narrowly defined areas of competence to an integral, independent and important part of the judicature of the Communities, with a clear and distinctive role; "*le juge de droit commun*".[121] Only infringement cases, cases assigned to a judicial panel and those reserved in the Statute for the CJEC[122] were left outside its competence.[123] As to the preliminary references, according to the new Article 225(3) the CFI "shall have jurisdiction to hear and to determine questions referred for a preliminary ruling under Article 234, in specific areas laid down by the Statute".

In addition, the symbolic status of the CFI and its independence from the CJEC were further enhanced.[124] Whereas previously the CFI was only "attached to the Court of Justice",

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On the other hand, he referred to the advantages of having all national systems represented. See *Rodriguez Iglesias* (*2000a),* p. 3.

[120] *Iannone (2005),* p. 162.

[121] *Iannone (2005),* p. 169.

[122] In Article 51 of the Statute annexed to the Treaty of Nice actions brought by Member States, by the institutions and by the Central Bank were reserved for the CJEC.

[123] The new Article 225(1) first subparagraph provided that "'The Court of First Instance shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 230, 232, 235, 236 and 238, with the exception of those assigned to a judicial panel and those reserved in the Statute for the Court of Justice. The Statute may provide for the Court of First Instance to have jurisdiction for other classes of action or proceeding".

[124] *Johnston (2001),* p. 503.

according to the new wording of Article 220 the "Court of Justice and the Court of First Instance, each within its jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed" which clearly elevated the institutional status of the CFI. This was confirmed by the provision of specific articles concerning its composition and jurisdiction and by the possibility to attach to it judicial panels.

However, the results of the Nice Treaty concerning the CJEC were largely criticised for not being sufficiently ambitious in tackling the courts' problems in a systematic and sustainable way. In addition to the critique presented by *Rasmussen*, referred to above, *Dyrberg* stated that the Nice Treaty only contains a "modest beginning of a process" and pleaded for an extensive reform.[125] *Johnston* stated that "a serious reform of the very system itself is necessary, if the Union's desire to become a first-rate world economy is to be matched by a first-rate administration of justice"[126] and Advocate General *Ruiz-Jarabo Colomer* regretted the lack of will to find a global and systematic solution to the problems of the judiciary.[127] *Wouters*, on a more general level, criticized the Nice Treaty for not enhancing the legitimacy of the CJEC for instance by making the nomination system of members more democratic and by introducing separate and dissenting opinions at the CJEC, which would add openness and accountability.[128] On the other hand, many acknowledged that despite these shortcomings many significant changes were indeed adopted.[129] In retrospect it has even been said that these changes constituted a first step in the development from a Community jurisdiction towards a Community judicial system[130] and that they marked a revolution in the relation between the CJEC and the CFI.[131]

[125] *Dyrberg (2001),* pp. 292−294.
[126] *Johnston (2001),* p. 499.
[127] *Ruiz-Jarabo Colomer (2001),* pp. 705−706.
[128] *Wouters (2001),* pp. 345−347.
[129] See e.g. *Johnston (2001),* p. 522, *Ruiz-Jarabo Colomer (2001),* p. 705 and p. 722 and *Khan (2002),* p. 12.
[130] *Geelhoed (2005),* pp. 399−402.
[131] *Iannone (2005),* p. 161.

3.5 The establishment of the Civil Service Tribunal

The Nice Treaty entered into force on 1 February 2003 and already before the end of the year the Commission presented its proposal for establishing a CST.[132] The proposal was, according to its explanatory part, one component of the reform of the court system provided for by the Treaty of Nice to "remedy the growing hold-ups in the Community courts".[133] The proposal included the creation of a small tribunal consisting of six judges. From an institutional point of view the real novelty of the proposal was the creation of a committee tasked to give an opinion on the candidates' suitability to perform the duties of judge.[134] According to the proposal the committee, consisting of seven members, would give an opinion on candidates' suitability before the nomination of judges by the Council and to draw up a list of the candidates having the "most suitable high-level experience". The actual decision establishing the CST would only contain the necessary institutional provisions, whereas the articles related to the functioning of the CST would be in an annex of the Statute of the Court of Justice, the underlying idea being that other annexes could easily be added in case of establishment of further special tribunals – which at the time seemed to be the general assumption.[135]

The handling of the proposal in the Council was relatively swift and uncontroversial, and most parts of the proposal were accepted almost as such (although the number of judges was raised from the proposed six to seven and some other minor adaptations were made). Nevertheless, the parts relating to the nomination of judges were subject to long discussions in the Council. This was hardly surprising, taking into account that for the first time the "one judge per Member State" principle was to be set aside and the prerogative of Member States to choose their national candidates would be abolished. After careful consideration the

[132] Proposal for a Council Decision establishing a European Civil Service Tribunal, COM(2003) 705 final, 19.11.2003.
[133] Paragraph 5.1.1 of the proposal.
[134] This part of the proposal was inspired by the draft Constitution (at the time still on the table) that in its Articles III-260 to III-262 provided for such a committee to be established in order to give an opinion before the nomination of judges and advocates general.
[135] See e.g. *Dehousse (2011),* p. 30 and Advocate General *Jacobs*, in the report "The Workload of the Court of Justice of the European Union", House of Lords: European Union Committee, Justice and institutions sub-committee, "Oral evidence with associated written evidence", p. 60.

Council opted for a system based on an open call for applications in which any union citizen who fulfils the conditions could apply, and the committee was tasked to screen the applications.[136] Thus, the system of selecting judges adopted could be characterised "merit-based", as opposed to "Member-State -based".[137] However, the Council was obligated, when appointing judges on the proposal of the committee, to ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis and as broad a representation of the national legal systems as possible.

The Council Decision establishing the CST[138] was adopted in November 2004, but it took one year before the President of the CJEC officially could declare that the CST had been constituted. Meanwhile, a call for applications to nominate the first judges was launched and the committee, presided by the former CJEC Judge *Sevón*, had completed its first ever task. Out of 243 applications[139] the committee compiled a list of 14 persons, ranked in order of preference (even though the latter was not foreseen by the Decision, which only requires the list to contain at least twice as many candidates as there are judges to be appointed).[140] The Council obediently nominated the first seven persons on the list to be the first judges of the CST[141] and in December 2005 the competence to exercise at first instance jurisdiction in staff cases was officially transferred to the CST.[142]

[136] According to fourth paragraph of Article 225a "[t]he members of the judicial panels shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office."
[137] In a merit-based system some kind of a nomination committee can be considered a *conditio sine qua non* since, as one can imagine, without any prior filtering by an outside body the Council would have been driven to endless discussions and disputes over the candidates.
[138] Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal, 2004/752/EC, Euratom, OJ 2004 L 333, p. 7.
[139] *De Waele (2015),* p. 47.
[140] *De Waele (2015),* p. 40 and p. 47.
[141] Council Decision of 22 July 2005 appointing Judges of the European Union Civil Service Tribunal, 2005/577/EC, Euratom, OJ 2005 L 197, p. 28
[142] Decision of the President of the Court of Justice recording that the European Union Civil Service Tribunal has been constituted in accordance with law, OJ 2005 L 325, p. 1.

3.6 The Treaty of Lisbon

The unfortunate Constitution, killed by the French and Dutch referenda in May and June 2005, was officially buried after a "period of reflection" in the June 2007 European Council meeting. In the same meeting it was decided to convene a new IGC with a task to draw up a "Reform Treaty" amending the existing Treaties "with a view to enhancing the efficiency and the democratic legitimacy of the enlarged Union, as well as the coherence of its external action".[143] The result was the Lisbon Treaty[144] that brought significant changes to the system of judicial protection but did not add very much to the architecture of the judicature as such.

From an institutional point of view the most interesting novelty was the creation, by Article 255 of the Treaty on the Functioning of the European Union[145] (hereinafter: TFEU), of a panel (hereinafter: Article 255 Panel) tasked to give an opinion on candidates' suitability to perform the duties of judge or advocate general before the governments of the Member States make the appointments. The Article 255 Panel was a replica of the committee already in use in the CST. Nevertheless, the nature of the task of the new Article 255 Panel was much more delicate, as it would scrutinize candidates proposed by Member States' governments, whereas the CST panel handled individual applications from persons applying in their personal capacity. This provision, which can be seen as a direct answer to the demands of making the nomination procedures less political and more democratic and transparent[146], fitted well with the spirit of the Lisbon Treaty in enhancing the democratic legitimacy of the court members.

There were also visible changes relating to the names of the court. For the first time the institution as such got a name, different from that of the higher court ("The Court of Justice of the European Union"). This was certainly a welcome revision, as it made it possible to

[143] Preamble of the Lisbon Treaty.
[144] Signed on 13 December 2007 in Lisbon, the Treaty entered into force on 1 December 2009.
[145] Consolidated version of the Treaty on the Functioning of the European Union.
[146] According to *Dyrberg,* for instance, *"[t]he qualifications required by Article 223 EC (independence beyond doubt, eligibility for the highest judicial offices in the country concerned or to be a jurisconsult of recognised competence) are, to say the least, not always fulfilled in practice*". He, however, proposed involving the European Parliament in the procedure. See *Dyrberg (2001),* pp. 345−346. See also *Wouters (2001),* pp. 345−347 and *Barents (2010),* p. 712.

distinguish references to the higher court as an individual court and references to the judiciary as an institution. Nevertheless, this amendment did not have any concrete repercussions as the institution CJEU was not endowed with any administrative or other competences or structures of its own and the president of the CJ would act also as the president of the whole institution. The names of the individual courts, apart from that of the CST, were also amended. The CJEC became "the Court of Justice" (hereinafter: CJ) and the CFI “the General Court".

4 The saga of the latest reform

This part presents the latest reform of the EU's court system, still partly unfinished. The reform consists of doubling the number of judges of the GC and of abolishing the CST. It is the result of a difficult compromise in an impasse and clearly the most controversial reform in the history of the CJEU. The reform was also marked by the fact that for the first time the European Parliament was involved in the procedure of amending the Statute of the CJEU, following an amendment brought by the Lisbon Treaty that changed the decision-making procedure in amending the Statute to the ordinary legislative procedure.

4.1 The background of the reform

As was explained in earlier, in section 3, the purpose of the establishment of the CST was to alleviate the workload of the other courts and especially that of the GC.[147] Nevertheless, no-one seemed to think this measure would solely constitute a magical cure solving the problems of the CJEU related to its growing number of cases. For instance Advocate General *Geelhoed* predicted as early as in 2005 that the growth in the demand for legal protection (caused by *inter alia* enlargements), changes in the scope of the union's powers and increased

[147] See Proposal for a Council Decision establishing a European Civil Service Tribunal, COM(2003) 705 final, 19.11.2003, paragraph 5.1.1.

legislative activity would lead to the demands on the EU courts growing significantly in five to ten years' time, which should be responded to by structural changes.[148] Also others such as *Barents* voiced their worries over the capacity of the CJEU to handle the increasing workload in the near future.[149]

These predictions proved to be correct in some respect, but the situation was not as straightforward as that. At the end of the first decade of the new century all three courts were in a very different situation as regards their respective workloads. As will be explained in the following, in summary the CST was doing well, the CJ was doing ok and the GC was in trouble. The reason for this divergence was first and foremost in the different nature of their tasks and competences. The CST, as a special court, had a more stable field of competence that was not likely to be enlarged by outside factors such as Treaty changes or waves of new legislation like that of the two other courts. It is also important to stress that the statistics showing the numbers of cases and their handling in the respective courts are necessarily not comparable. The role of the GC covers factual matters the examination of which can often be extremely laborious, especially in competition cases.[150] On the other hand, even though the CJ often deals with cumbersome and politically difficult cases, its competence also covers cases that are not very laborious (such as infringement cases regarding failures to implement directives and simple preliminary references). Hence, even though in the following the situations of the three courts are examined in light of statistical information, these figures should not be compared to each other but assessed separately.

4.1.1 The situation of the Civil Service Tribunal

In the CST in 2010 the number of new cases was 113 and that of completed cases 155, and the average duration of proceedings was a fairly reasonable 18.1 months.[151] Although the

[148] *Geelhoed (2005),* pp. 407−408. He gave his preference to re-organising the judiciary according to a model consisting of a central Court and territorially decentralised specialist Union courts.
[149] *Barents (2010),* p. 728.
[150] See e.g. *Dehousse (2011),* pp. 16−17 and the report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committee, paragraph 45.
[151] Annual Report of the CJEU 2010, p. 226.

President of the CST, *Paul Mahoney* stated in the Annual Report 2010 that the number of new cases was significantly higher, the number of cases closed lower and the duration of proceedings longer than the previous year, all in all the CST seemed to be coping very well with its workload.[152]

4.1.2 The situation of the Court of Justice

Although the CJ had had problems with its workload, it managed to surprise the legal community in a positive way by being able not only to cope but even to improve its performance. As a result of a series of internal measures aimed at making its work more effective after the enlargement and the entry into force of the Lisbon Treaty it managed to cut down its stock of cases so that whereas in the end of 2003 there were 974 pending cases, in the end of 2010 the corresponding figure was 799. In addition, it was able to squeeze in the time to deal with cases so that whereas in 2003 the average times to give a judgment were 25,5 months for preliminary references and 24,7 months for direct actions, in 2010 the respective figures were 16,1 months and 16,7 months.[153] In its Annual Report of 2010 the CJ lists as reasons for this the reforms of its working methods and the improvement in its efficiency due to the increased use of the various procedural instruments at its disposal (such as the introduction of the urgent preliminary ruling procedure and the possibility of giving a judgment without an opinion of the advocate general).[154] The transfers of competence from the CJ to the GC following the Nice Treaty and the extra resources brought by the enlargements in 2004 and 2007 also figured among the reasons behind the CJ's successful case management.[155]

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[152] Annual Report of the CJEU 2010, p. 197. See also the report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committee, according to which "The CST has been a success story and the Committee has no concerns regarding its ability to manage its case-load" (paragraph 56).
[153] Source: Annual Report of the CJEC of 2003, p. 222 and Annual Report of the CJEU 2010, p. 96.
[154] Annual Report of the CJEU 2010, p. 96. For a detailed account of these measures see *Jacobs (2004),* p. 823 and *Naômé (2008).*
[155] *Rosas – Kaila (2010),* p. 281.

However, the number of cases kept rising and many commentators were of the opinion that a workload crisis was looming in the near future.[156] The balanced situation was partly due to the fact that the number of judges and advocates general had risen following the eastern enlargements in 2004 and 2007, but the new Member States did not generate cases with full speed yet. Most of their infringement procedures were still at the level of the administrative phase in the Commission, and their domestic courts did not have the habit of presenting preliminary references yet. In addition, the reforms brought by the Lisbon Treaty, such as the abolition of the pillar structure and the subsequent expansion of the area of the competence of the CJEU were bound to cause an increase in the number of new cases, but only at a later stage because the jurisdiction of the CJ to give preliminary rulings in the area of Freedom, Security and Justice was subject to a transitory period until 2014.[157] Thus, it seemed probable that this "honeymoon" was not to last for long.[158]

4.1.3 The situation of the General Court

In the GC a workload crisis was not only looming in the future, but a striking reality. The GC was heavily overburdened and was struggling to keep its head above the surface. The effect of the establishment of the CST on the workload of the GC had been only marginal and temporary and it seemed that the positive effects brought it had been quickly outweighed by other factors.

The GC had been already for a while making efforts to render its work more effective by internal measures and had in fact managed to improve its productivity[159] but this did not prevent the stock of pending cases from growing and the handling times from lengthening. There were several reasons for this situation, such as the gradual expansion of the GC's

[156] See e.g. *Guinchard (2011),* p. 992 and the report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committee, paragraph 44.
[157] *Rosas – Kaila (2010),* p. 282.
[158] See the report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committee, "Written evidence", memorandum of professor Damian Chalmers, p. 16.
[159] In 2008 it was able to give 605 judgments whereas in 2007 the corresponding figure had been 397 (the Annual Report of the CJEU 2008, p. 171).

competences since its establishment, the expansion of EU's competences into new areas and the growth of litigation on areas such as competition, trademark and sanctions (officially called "restrictive measures")[160], but also the increase in complexity and sophistication of cases.[161] In a seminar held for the occasion of the 20th birthday of the GC on 25 September 2009, President *Jaeger* took up the critical state of this tribunal and called for a reform. He drew attention to the slow but inexorable growth of the stock of pending cases which in turn caused lengthening on its handling times, which according to him is the real indicator of the health on a judicial system.[162]

In the reference year 2010 the average duration of proceedings in the GC was in state aid cases 32,4 months and in competition cases 45,7 months.[163] In 2009 the CJ handed down a judgement stating that competition proceedings before the GC, having lasted for five years and ten months, had infringed the principle according to which the case should be dealt with within a reasonable time.[164] The CJ referred in its judgement to the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union (hereinafter: CFR) and to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and noted also the then ongoing negotiations on the accession of the EU to the ECHR.

The next year the situation was even worse. The number of new cases was in a heavy rise and the average handling time of a competition case in 2011 was a stunning 50,5 months. The GC stated in the Annual Report of 2011 that as all the possibilities for internal reform have already been fully exploited, a structural change is indispensable.[165] Thus, by the turn of the decade it had become clear for everybody that the GC needed help.

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[160] See e.g. *Alemanno and Pech (2017)*, p. 131.
[161] *Tridimas (2018)*, p. 605.
[162] *Jaeger (2009).*
[163] Annual Report of the CJEU 2010, p. 183. In categories of "intellectual property" and "other direct actions" the average handling times were more reasonable (20,6 and 23,7 months respectively).
[164] Case C-385/07 P *Der Grüne Punkt*. See also an earlier case C-185/95, *Baustahlgewebe GmbH v. Commission*, paragraph 47 (approximately 5 years and six months).
[165] Annual Report of the CJEU 2011, pp. 124−125.

4.1.4 Solutions proposed to the workload problems

There were several possibilities for alleviating the workload of the CJ and/or of the GC without changing the Treaties. These included, first, adding the number of judges in the GC. According to Article 19(2) of the Treaty on the European Union[166] (hereinafter: TEU) the "General Court shall include at least one Judge per Member State" and the number of judges could be altered by amending the Statute. Secondly, further specialised courts could be created on the basis of Article 257 TFEU. Thirdly, the competences of the respective parts of the judiciary could be altered by transfers of jurisdiction on the basis of Article 256 TFEU.[167] Fourthly, the CJ could reduce the number of new preliminary references by filtering them more effectively.[168] In addition, both courts could carry out internal measures aimed at making their working methods more effective – which they had already been doing.

Different contributions as to the solutions were presented, the most ambitious of which probably was the study conducted by the British House of Lords' EU Committee (hereinafter: EU Committee) in 2010−2011. The EU Committee heard a large number of witnesses representing the EU institutions, the lawyers, the academia and the industry and prepared on the basis of their contributions a comprehensive study with concrete proposals. The background information feeding into the final report illustrates well the range of views concerning the state of the EU's judiciary and the preferred solutions for its well-known problems.

As regards the representatives of the "users" of the union courts, the CCBE stated in its written evidence that the situation regarding delays before the GC is unacceptable and that citizens as well as business community are unable to rely on effective judicial protection. The CCBE called for an urgent structural reform, either by increasing the number of judges at the

[166] Treaty on the European Union (consolidated version), OJ 2012 C 326, p. 13.
[167] Nevertheless, this alternative could only be envisaged together with another measure such as adding the number of judges in the GC. In a situation where neither the GC nor the CJ had extra resources, transfers of jurisdiction would only move the centre of problems from one court to another.
[168] By, for instance, rewriting the CILFIT submission criteria or by filtering the appeals [see e.g. *Rasmussen (2000)*, pp. 1107−1110].

GC and creating a special chamber for trade mark cases, or by establishing a specialised tribunal for trade mark cases.[169] The CCBE had already in summer 2010 drawn the attention of the Member States' governments to the urgency of a structural reform by sending a letter to the permanent representatives of Member States in the EU.[170] The Confederation of British Industry stated that the average turnaround time for competition cases in the GC is unacceptable to companies[171] and gave its strong support to the establishment of an intellectual property tribunal.[172] In a similar vein, the European Circuit of the Bar of England and Wales saw that the courts are seeking to "operate a Rolls Royce with a Trabant motor" and continued the analogy by stating that either the motor should be upgraded or the car changed, for instance by creating a trade mark tribunal.[173]

The opinions of the scholars followed the same path. *Tridimas* doubted whether the waiting period for litigants meets the standards of Article 6(1) of the ECHR, suggesting adding the number of the judges in the GC and/or creating specialist tribunals for trade mark, competition and state aid cases.[174] *Jacobs*, on the other hand, ruled out adding the number of judges at the GC because he anticipated that the only politically viable possibility might be to double the number of judges, "which would be excessive". He gave his principled support to the creation of further specialised courts and proposed for the CJ a system whereby national court, when making a preliminary reference, would state its own provisional answer, which the CJ could endorse by giving a "green light".[175]

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[169] The Workload of the Court of Justice of the European Union, "Oral evidence with associated written evidence", pp. 28−30.
[170] See e.g. Letter dated 8 July 2010 from *José-Maria Davó-Fernández*, CCBE President, to Sir *Kim Darroch* KCMG, Permanent Representative of United Kingdom to the European Union, Annex I of the written evidence provided by the CCBE, "Oral evidence with associated written evidence", pp. 29−30.
[171] "Written evidence", p. 9. The other contributions made by actors presenting the "users" of the EU courts also found the handling times unacceptable; see, for instance, the answer of *Luis Romero Requena*, Director-General of the Commission's legal service, "Oral evidence with associated written evidence", Q114 and Faculty of Advocates, "Written evidence", p. 32.
[172] "Written evidence", pp. 14−15.
[173] "Written evidence", pp. 31−32.
[174] See the contributions by professor *Tridimas* and by EU Committee of the Law Society of England and Wales, *ibid.*, p. 37 and p. 43.
[175] "Oral evidence with associated written evidence", pp. 55−57 and pp. 60−61.

The CJEU itself contributed to the report, acting "in a spirit of openness and loyalty" and pointing out the exceptional nature of providing such a contribution for a national parliament. In its memorandum the CJEU, after presenting the relevant statistical figures, recognised the need to consider structural remedies such as either the increase of the number of judges at the GC or the creation of a specialist court, potentially in the field of intellectual property (without specifying its preference).[176]

In its final report[177], published in 2011 the EU Committee concluded that the GC is in the middle of a workload crisis ("the GC's own statistical information, and the evidence we received, point to significant problems with its existing workload and its ability to manage its future workload") and the CJ on the verge of one. The EU Committee stated that structural solutions need to be found urgently and recommended the option of increasing the number of judges serving the GC.[178] The EU Committee was confident that the Council can agree to appoint the necessary number of extra judges, for instance one third of the present number on a rotating basis.[179] As regards the CJ, the EU Committee settled for recommending certain measures related to management of cases and, as a structural measure, adding the number of advocates general.[180] The Committee expressly rejected the creation of more special tribunals as too inflexible but suggested that the GC should consider the use of specialist chambers.[181]

4.2 The legislative procedure

Inside the buildings of the court in Kirchberg, however, preparations for a reform were already ongoing. The GC itself had been convinced of the need for a structural solution already for a long time. It had started to prepare the issue in silence as early as in 2007, and had suggested in 2009 that the CJ would present a proposal for establishing a special tribunal

[176] See the contribution of the CJEU, "Written evidence", p. 30.
[177] The Workload of the Court of Justice of the European Union, House of Lords: European Union Committee, 14th report of session 2010−2011.
[178] *Ibid.*, point 53.
[179] *Ibid.*, pp. 36−37.
[180] *Ibid.*, p. 117.
[181] *Ibid.*, p. 34.

in the area of intellectual property and trade marks (this was the only feasible way to act as the GC does not have an independent right on initiative).[182] These cases were similar in nature and not related to core questions of the EU law and they were numerous, so transferring them would have a significant impact on the workload of the GC.

The CJ reacted by instituting a common committee of the two courts, tasked to prepare a proposal to alleviate the workload of the GC. The committee delved into the question thoroughly and, as a result, the CJ launched a legislative proposal in April 2011.[183] The proposal was based on the second paragraph of Article 281 TFEU which stipulates that the European Parliament and the Council, acting either at the request of the CJ and after consultation of the Commission, or vice versa, may amend the provisions of the Statute, acting in accordance with the ordinary legislative procedure. Thus, this was the first time that the European Parliament would have a significant role in a process aiming at reforming the court system.

4.2.1 The legislative proposal

The document contained a series of amendments to the Statute, most of which related to the internal architecture of the two courts. Regarding the CJ itself, there were several proposals aimed at simplifying the process, in addition to which it was proposed to establish the office of vice-president of the CJ and to amend the rules relating to the composition of its grand chamber. However, the most interesting and the most radical amendments related to the internal architecture of the GC. The proposal included a solution that was fundamentally different from the one preferred by the GC itself. Instead of suggesting the creation of a new special tribunal the CJ proposed adding the number of judges in the GC by twelve (from 27 to 39).

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[182] *Jaeger (2017)*, p. 31.

[183] Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto (doc. 8787/11 of the Council, 7.4.2011, as well as its ADD 1 containing an assessment of the financial impact of the proposed amendments). This proposal also included other parts related to *inter alia* the size and composition of the grand chamber of the CJ and the possibility to nominate additional judges of the CST.

In a detailed explanatory part it was explained why the CJ had, after a careful weighing up of the two options, come to the conclusion that an increase in the number of judges by twelve is "clearly preferable", for reasons relating to effectiveness, urgency, flexibility and consistency of EU law. The proposal was silent on the method of choosing the additional judges, as it is not a matter to be decided by the legislator.

As regards *effectiveness*, the CJ stated that establishing a specialised court in the field of intellectual property would not, taking into account the volume of cases pending before the GC, resolve the overload but would "offer only a brief respite, as did the transfer of staff cases". Secondly, the CJ claimed that adding judges can be done more expediently than establishing a completely new tribunal, which is important considering the *urgency* of the situation (little did they know, as it finally took more than four years for the proposal to be adopted). Thirdly the CJ stressed the *flexibility* of the proposed solution, as in the GC it is possible to orient human resources according to where they are needed. In addition, increasing the number of judges does not rule out the creation of a specialist tribunal at some point, but it would be difficult to dismantle a new court once it had come into operation (also this argument seems different in retrospect, seeing that the CST was in fact dismantled). Fourthly, the CJ was worried that the creation of a trade mark tribunal would jeopardise the *consistency of EU law* because in addition to cases currently brought before the GC there are disputes relating to infringements or to national trade marks, which are brought before the CJ by references for a preliminary ruling on the interpretation of the relevant directives.

A little later the CJ also lodged a document containing an assessment of the financial impact of the proposed addition of 12 judges.[184] Both the direct costs of such amendment (such as remunerations and allowances of the new judges and their staff) and the infrastructure and operating costs were included. However, the costs related to the potential additional staff needed for certain services such as translation, interpreting, human resources *etc.* were left

[184] Doc. 8787/11 ADD 1 of the Council, 2.5.2011

outside the assessment because of their uncertainty. The CJ estimated the costs of the proposal to be, in a normal year of operation, approximately 13.6 million euros.

4.2.2 Year 2011 – a slow yet hopeful start

The Council started the handling of the proposal promptly. The proposal was given to the working party "Court of Justice", where it faced, under the Hungarian presidency of the Council, a reception that could be qualified as sympathetic yet inquisitive. Even though the necessity of a structural reform was largely acknowledged, the financial implications of the reform were criticised, and some delegations openly preferred the option consisting of the establishment of a special trade mark tribunal. The method of designation of judges, which was to become the main reason for the prolonged examination of the proposal, also came up. This was hardly a surprise, as already for long various commentators had predicted such problems in case of a decision to add the number of judges in the GC.[185]

The CJ reacted to these doubts by sending the (then Polish) Presidency of the Council in July a document clarifying "the reasons why, following a lengthy process of reflection involving the General Court, the Court of Justice has come to the conclusion that an increase in the number of Judges of the General Court is the only possible solution, both in terms of reducing the stock of pending cases and the time taken to deal with cases that are within the jurisdiction of the General Court, and of preserving the coherence of the judicial system of the European Union."[186] The Registrar of the CJ, *Alfredo Calot Escobar*, also contributed by sending to the presidency a letter aimed at providing answers to some of the questions presented in the working group.[187] The huge workload of the GC was illustrated by facts and

[185] See for instance CFI President *Vesterdorf* in the Hanasaari conference on problems related to enlarging the CFI (*Sundström and Kauppi (1998),* pp. 199−200), *Guinchard (2011)* and Advocate General *Jacobs*, in the report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committee, document containing "Oral evidence with associated written evidence", p. 55.
[186] Council doc. 12719/11 of 11 July 2011, Draft amendments to the Statute of the Court of Justice of the European Union and Annex I thereto – Further information concerning the proposal to increase the number of judges of the General Court.
[187] Doc. 16904/2011, Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto - Observations made by the Court of Justice in connection with the proceedings of

figures. For instance, in 2011 the registry had to enter a total of 44 000 procedural documents in the register and the files of cases under preparation occupied at the moment 505 linear metres. The letter also recounted meticulously all the internal measures taken by the GC to make its work more effective, in order to prove that every stone has been turned.

The General Affairs Council discussed the proposal on 5 December 2011 on the basis of a note from the presidency in a short manner, without making any conclusions.[188]

The Commission, for its part, gave its opinion on the proposal in September 2011.[189] The Commission supported in general increasing the number of the GC judges (rather than creating a new special tribunal). Nevertheless, the Commission proposed some additional amendments aimed at enhancing the efficiency in the enlarged GC, such as inserting a provision according to which the GC should have an appropriate number (not fewer than two) of chambers specialised to certain subject-matters. The Commission also courageously proposed two alternative methods for choosing the additional judges. The first model, quite complicated, was based on an egalitarian rotating system while retaining the possibilities of renewal of terms as far as possible. The second model, no less cumbersome, was based on the first model but with the addition of taking into account the need for specialisation.

4.2.3 Year 2012 – the problems start to escalate

In the European Parliament the proposal was welcomed in a positive light and the rapporteur MEP *Alexandra Thein* (ALDE) found the arguments put forward by the CJ persuasive. However, the rapporteur suggested to split the handling of the proposal in two and to adopt

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the Council's Working Party on the Court of Justice on 14 October 2011, 14.11.2011.

[188] Doc. 17657/11, Reform of the Statute of the Court of Justice of the European Union – Information from the Presidency.

[189] Commission opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596 final.

only the less controversial parts, leaving the parts related to the GC reform to be handled at a later stage.[190]

In the Council, during the first half of the year the Danish presidency tried to find a solution by proposing a lottery system for selecting the 12 judges but had no success.[191] On the second half of the year the Cypriot presidency continued the efforts and the General Affairs Council discussed the proposal in its meeting of 10-11 December 2012. The press release of the meeting[192] shortly described the compromise proposal of the presidency consisting of adding to the GC nine extra judges, with a system of designation based on two parallel systems of rotation. There would have been, according to the proposal, one "pool" consisting of six largest Member States that would designate four additional judges for two successive mandates and a second "pool" consisting of all the other Member States that would designate five judges for a single mandate. This complicated arrangement, in which Member States were divided into two unequal categories, did not get the necessary support in the Council. The press release stated that the presidency will inform the CJ that agreement has not been reached and that the Council awaits the proposal for new Rules of Procedure of the GC. Before the new Rules of Procedure have been adopted, the Council would not discuss the issue of judges.

4.2.4 Year 2013 – an impasse

In 2013 the European Parliament continued to act upon the proposal actively. The Committee on Legal Affairs (hereinafter: JURI Committee) discussed the matter in its meetings and

[190] Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, 02074/2011 C7-0126/2012 – 2011/0901B(COD), 5 June 2012. However, the proposals related to *inter alia* the creation of the office of vice-president for both courts were adopted by the legislator in July 2012 (Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto, OJ 2012 L 228, p. 1).
[191] *Jaeger (2017)*, p. 32.
[192] Council doc. 17439/12, Press release, 3210th Council Meeting, General Affairs, Brussels, 11 December 2012.

organised a public hearing with CJ President *Skouris* on 24 April 2013 in Brussels.[193] He expressed his concern over the difficult situation of the GC and the fact that despite the efforts made by several presidencies the Council had not managed to reach a political agreement on the method of designation of the additional judges. President *Skouris* stressed that the question of designation of judges belongs to the Member States, which is why the CJ has not made any proposals thereon. Nevertheless, he listed three fundamental elements that the future method, according to him, must fulfil. The key words were *competence*, *stability* and *geographical balance*. First, on the competence of judges President *Skouris* expressed his preference for a nomination method based on the merits of candidates rather than a purely geographical method. Secondly, as regards stability he warned the JURI Committee from opting for a system based on non-renewable mandates, for this would seriously harm the efficiency of the CG. Thirdly, he stressed the importance of the GC being composed in a balanced manner both as regards the geographical distribution of members and the representation of national legal systems.

The JURI Committee adopted its final report on 10 July 2013[194] and on 12 December 2013 the European Parliament proceeded to a partial vote at 1st reading in the plenary.[195] According to the amendments adopted by the plenary there should be 12 additional judges in the GC, appointed exclusively on the basis of their professional and personal suitability, regardless of their nationality (however, there should be no more than two judges from one Member State). Nevertheless, the European Parliament did not fix its position in first reading but referred the issue back to the JURI Committee for re-consideration, and the vote on the legislative resolution was postponed. The reason for this was that the (Lithuanian) presidency of the Council had asked the European Parliament to postpone the vote on its position at first

[193] Summary of the Committee on Legal Affairs (JURI) of the European Parliament, held in Brussels on 22, 24 and 25 April 2013, Council doc. 9077/13 (*Skouris'* speech in Annex I).
[194] Amendments adopted by the European Parliament on 12 December 2013 on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of judges at the General Court. [P7 TA(2013)0581].
[195] Report on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court, 02074/2011 – C7-0126/2012 – 2011/0901B(COD), 10 July 2013.

reading to keep the possibility open to start negotiations between the Council and the European Parliament in view of a first reading agreement.[196]

However, in the Council the negotiations seemed to have reached an impasse, all the possible options having been explored without success. The suggestion of the Lithuanian presidency to gradually double the number of judges did not gain success.[197]

In November 2013 the representatives of the incoming Greek presidency addressed President *Skouris* a letter announcing its intention to find a solution to the question of designation of judges during their presidency and asked the President to present in writing the same considerations he had already orally given in JURI Committee in April. President *Skouris* answered with a letter containing a memorandum with his reflections on a possible method of selection, together with a table illustrating how the proposed procedure would operate in the coming years.[198] He pointed out that the JURI Committee had proposed a method based on the professional suitability of candidates and stated that also the CJ is of the opinion that the nationality of judges ought not to become the decisive factor determining the appointment, as all EU nationalities and all the legal orders of the EU already are represented in the GC. President *Skouris* went on to emphasize that the most important criterion should be professional competence which involves "an exceptional level of expertise in Union law, mastery of several official EU languages and the ability to work in a collegial and international environment". As to the number of judges he considered that the addition of nine judges would be sufficient at this point, considering the extra judge brought by the accession of Croatia in July 2013.

Almost as if to underline the seriousness of the situation, the CJ gave in November 2013 three judgments in which it found that the procedure in the GC had breached the second

[196] See information note drafted by the General Secretariat of the Council: Draft Regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto – Outcome of the European Parliament's proceedings (Strasbourg, 9 to 12 December 2013), in doc. 17499/13 of 13 December 2013.
[197] *Jaeger (2017),* p. 33.
[198] In Council doc. 18107/13.

paragraph of Article 47 of the CFR by failing to comply with the requirement to adjudicate within a reasonable time.[199]

4.2.5 Year 2014 – a political compromise

The Greek presidency of the Council started immediately its efforts to find a compromise and the issue of extra judges was put on the agenda of the Committee of Permanent Representatives (hereinafter: Coreper) already in January. In its background note[200] the presidency asked the Coreper to give it a mandate to start trialogues with the European Parliament so as to reach, prior to the elections in May 2014, a first reading agreement. According to the note the discussions with the European Parliament would be limited to the question of number of judges (nine), because the legislator has no competence in relation to the method of appointment and nomination of judges. The presidency also asked the Coreper to give a mandate to the working party "Court of Justice" to conduct in parallel discussions on the method of appointment of the extra judges.

The mandates were given, and the discussions started. The JURI Committee endorsed in February by unanimity a compromise text, agreed in the trialogue, according to which the number of judges would be added by nine. The European Parliament proceeded by adopting in April 2014 a legislative resolution on the Court's initial proposal, thereby closing its first reading.[201]

However, in the Council problems were not over. Although the method of appointment of the extra judges was discussed in the Coreper several times in March on the basis of a proposal from the Greek presidency for a merit-based model with an element of rotation, there was no

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[199] See judgments in cases C-58/12 P, *Groupe Gascogne* v *Commission*, paragraph 96, C-50/12 P, *Kendrion v Commission*, paragraph 106 and C-40/12 P, *Gascogne Sack Deutschland v Commission*, paragraph 102.

[200] Note from the presidency to the Coreper (part 2), doc. 5355/14 of 15 January 2014, "Reform of the General Court of the European Union".

[201] European Parliament legislative resolution of 15 April 2014 on the draft regulation of the European Parliament and of the Council amending the Protocol on the Statute of the Court of Justice of the European Union by increasing the number of Judges at the General Court (02074/2011 – C7-0126/2012 – 2011/0901B(COD)), of 15 April 2014.

agreement. The reason for this was that certain small and/or "new" Member States could not accept any kind of merit-based approach proposed by President *Skouris*, out of fear that in such a system their nationals would not be represented (despite the fact that every Member State would naturally have continued to have at least one judge at every given moment).[202] Even though legally it would have been possible to adopt the legislative act without knowing how the extra judges were to be appointed, politically this was unthinkable. Thus, in April 2014 after one more failed effort the Greek presidency acknowledged in its letter to President *Skouris* the impossibility of reaching an agreement. The presidency stated, frustrated, that any solution including a number of posts which is lower than the number of Member States would most likely face the same difficulties.[203] After this failed effort the reform was generally considered to be dead and buried and the mood was depressed and deeply disappointed. The then Vice-President of the CJ *Lenaerts* stated in a CCBE Conference in April 2014 that "[i]n terms of the EU Courts' structure I am not optimistic that any reform will be possible in the near future"[204] and Judge *Rosas* affirmed at a Conference held at Fordham University School of Law in New York City that the reform initiative seemed dead.[205]

Nevertheless, to everybody's surprise in the latter half of 2014 the phoenix rose from the ashes. The Italian presidency of the Council asked the CJ to present new suggestions and the CJ answered in November 2014 with a completely novel idea, based on doubling the number of judges of the GC in three stages by 2019 and on abolishing the CST.[206] The CJ motivated its "upgraded proposal of 2014" (as this document will be called in this paper) mainly by the fact that the legislator had not been able to agree on its first proposal while the distress of the GC kept getting worse and the first actions for damages caused by breaches of the reasonable

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[202] *Abenhaïm (2014a)* and *Jaeger (2017)*, p. 33. Some insight into the way of thinking of these Member States is provided in *Hadroušek and Smolek (2015)*, pp. 195−198.
[203] See e.g. intervention of *Marc Jaeger* in CCBE, Proceedings of the Conference "EU Courts – Looking Forward", p. 43.
[204] Keynote speech of *Koen Lenaerts* in CCBE, Proceedings of the Conference "EU Courts – Looking Forward", p. 7.
[205] *Jaeger (2017)*, pp. 33−34.
[206] Response of the Court of Justice to the Presidency's invitation to present new proposals on the procedures for increasing the number of Judges at the General Court of the European Union (doc. 14448/1/14 of the Council, 20.11.2014).

time principle by the GC had already been brought.[207] On the other hand the CJ referred to the fact that there had in recent years been constant problems in filling the vacancies at the CST, due to problems in the Council to agree on the nationality of the new judge or judges to be nominated. The requirement of a balanced composition of the CST "on as broad a geographical basis and as broad a representation of the national legal systems as possible" had turned against itself and had opened the door to endless disputes that risked paralysing the whole institution.[208] The CJ noted in its proposal that two CST nominations were still pending even though the term of office of the previous judges had expired already two months ago. The proposal also explained, in a section called "lack of alternatives", in a thorough manner why the option of creating new special tribunals is not a feasible one. The estimated cost burden of increasing the numbers of judges at the GC, in a normal year of operation, would according to the document be 22.9 million euros.

The Italian presidency drafted swiftly on this basis a document entitled "Reform of the General Court – Way forward"[209] which included the main elements of the CJ's new proposal, as well as some additional measures designed to alleviate the budgetary implications (such as reducing the number of legal secretaries and assistants). The Coreper reached in December an agreement in principle and endorsed this document to serve as a basis for further work.[210]

Nevertheless, nearly not everyone was happy with the CJ's new proposal and criticism kept flowing from different actors. Even though no sufficient minority was reached to block the agreement in principle in the Council, a significant number of Member States were opposed to it.[211] Finland was also among the critical Member States, disputing the proportionality of

[207] The CJ referred to cases T-479/14 *Kendrion* v *Court of Justice of the European Union* and T-577/14 *Gascogne Sack Deutschland GmbH and Gascogne* v *Court of Justice of the European Union*.
[208] See, for instance *Hadroušek and Smolek (2015)*, pp. 188−206, *Peers (2014)* and *Peers (2015).*
[209] Doc. 16576/14 of 8 December 2014.
[210] See, for instance doc. 6752/15, pp. 3−4.
[211] See *Quatremer (2015).*

the doubling of the number of judges.[212] However, when it became apparent that the blocking minority in the Council would not be reached, Finland did not vote against the proposal.

Perhaps the most interesting objection came from the side of the GC. The text of the proposal revealed that the plenary meeting of the GC had stated its preference for the establishment of a specialised trademark court and for the *status quo* to be maintained as regards the CST. In addition, President *Jaeger* declared in his letter to the Italian presidency his strong opposition towards the proposal and stated that there are more appropriate, more effective and less onerous means by which to strengthen the GC and to achieve better and faster outcome for litigants.[213] President *Skouris* answered with an angry letter in which he accused President *Jaeger* of "lack[ing] respect for institutional rules".[214]

In the European Parliament the new solution raised criticism among the members of the JURI Committee that announced that it would visit Luxembourg in order to take stock of the situation.[215]

4.2.6 Year 2015 – the reform takes shape in the midst of conflicts

Spring 2015 was the time of intense negotiations on the practical implementation of the political agreement reached in the Council. The CJEU gave in April a press release in which it explained the proposed solution, stressing the crucial importance of carrying out the reform and underlining that the GC was "not able to cope, in a sustainable and efficient manner, with the number and increased complexity of cases that must be heard".[216] The Coreper continued

[212] For Finland's positions see *E-jatkokirje* "Euroopan unionin tuomioistuimen ehdotus tuomioistuimen perussäännön ja sen liitteen I muutoksiksi; yleisen tuomioistuimen tuomarien määrän nostaminen", UM2014-01470.
[213] President *Jaeger's* letter of 9 December 2014 to *Stefano Sannino* (permanent representative of Italy to the EU). See e.g. *Robinson (2015b).*
[214] See e.g. *Robinson (2015c).*
[215] Summary record of the meeting of the European parliament Committee on Legal Affairs (JURI), held on Brussels on 24 September 2014 (in Council doc. 13756/14 of 30 September 2014).
[216] Court of Justice of the European Union, Press Release No 44/2015, 28.4.2015. Later many writers have claimed that this was not entirely true, as following a series of internal measures the GC had found ways to

to examine the question of nomination of judges. There seemed to be a high level of confidence for reaching an agreement, as the Coreper proceeded to organising in March a "lottery" in order to determine which Member States had the right to nominate the first 12 judges.

In the European Parliament the mood was quite different and had changed from its initial constructive optimism to open criticism. The new rapporteur MEP *António de Sousa Marinho e Pinto* (ALDE) was very critical towards the new proposals of the CJ, which he found to be unnecessary and too expensive, especially when at the same time several Member States were, because of the global financial crisis, compelled to drastically reduce their public spending. Many other members of the JURI Committee also presented sceptical views.[217] In March *Marinho e Pinto* addressed to the Council presidency an angry letter[218], deploring the lack of impact analysis concerning the new proposal and stating that from "any common-sense perspective" doubling the number of judges cannot be compared to an increase of 12 judges. The rapporteur also drew attention to the fact that the abolition of the CST was a fundamental alteration in the EU's judicial architecture, and yet it was being proposed without conducting the analysis required by Declaration 14 annexed to the Treaty of Nice.[219] According to the rapporteur, the sole purpose of the abolition was that it allowed arguing that only 21 new posts were created. As a conclusion the rapporteur stated that the CJEU had given a completely new proposal which must be treated in accordance with the correct institutional procedures. The rapporteur ended his letter by deeply regretting the fact that the Council had already organised a lottery deciding the 12 first Member States to get an additional judge, which according to him constituted a breach of the decision-making procedure and undermined the principle of loyal co-operation, amounting to an attack on the rights of the legislator.

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better cope with its workload and managed in 2015 to close more cases than new cases were coming in (see section 5.2.1).

[217] See summary record of the meeting of the European parliament Committee on Legal Affairs (JURI), held on Brussels on 23-24 February 2015 (in Council doc. 6752/15 of 3 March 2015).

[218] Attached to the Council doc. 8484/15 of 29 April 2015.

[219] "The Conference considers that when the Council adopts the provisions of the Statute which are necessary to implement Article 225(2) and (3), it should put a procedure in place to ensure that the practical operation of those provisions is evaluated no later than three years after the entry into force of the Treaty of Nice."

The Latvian presidency of the Council answered with a letter dated on 22 April 2015, stating that it does not share the views of the rapporteur and assuring, as regards the "lottery", that the intention was not to create a *"fait accompli"* but simply to ensure by this preparatory measure so as to appoint swiftly the first additional judges, when there is an agreement between the European Parliament and the Council.[220]

However, the two branches of the legislator were not only ones that were in the middle of a conflict; the smouldering disagreement inside the CJEU had also burst into flames. Chairman of the JURI Committee, *Pavel Svoboda*, had invited Presidents *Skouris* and *Jaeger* as well as some judges to be heard. President *Skouris* answered with a letter where he politely reminded of the various occasions where the CJEU has provided the European Parliament with information. He accepted the invitation but stated that with the participation of (only) himself and President *Jaeger* the meeting "will certainly have an appropriate format" and stressed that "it is for me to suggest the presence, if any" of other Members of the CJ and of the GC at the meeting.[221]

However, the JURI Committee ignored the wish of President *Skouris* and organised on 28 March 2015 a closed-door meeting, debating the issue in the absence of President *Skouris* and on the basis of a presentation by President *Jaeger* and interventions from four judges of the GC (*Irena Pelikánová, Franklin Dehousse, Guido Berardis* and *Anthony Michael Collins*).[222] All four judges were openly critical towards the reform and spoke in opposition of the doubling. According to them, “[i]ncreasing, let alone doubling, the number of judges at the General Court is yesterday’s solution for yesterday’s problem". In his intervention Judge *Collins* stated that the CST "is widely acknowledged as being a success from both a qualitative and quantitative perspective" and that it "appears to enjoy the confidence of the staff, their representatives and the institutions". Judge *Pelikánová* spoke about the practical usefulness of "a pyramid court system, as provided for by the Treaties" and Judge *Berardis*

[220] Attached to the Council doc. 8484/15 of 29 April 2015.
[221] Letter of President *Skouris* is linked to the blog posting *Robinson (2015c).*
[222] See e.g. *Jaeger (2017),* p. 31 and *Heath (2015a).*

presented some figures to demonstrate that, in reality, only a very small number of pending cases can be considered as "backlog" and claimed that many chambers already have a caseload below their capacity.[223]

It is hardly a surprise that all this severely irritated President *Skouris*. The last straw that broke the camel's back was an e-mail sent by the rapporteur *Marinho e Pinto* to the personnel of the European Parliament putting into question the statistical information provided earlier by the CJEU and claiming that the backlog was less severe than had been portrayed.[224] President *Skouris* reacted by sending to the President of the European Parliament *Martin Schulz* a letter deeply deploring the behaviour of the rapporteur in respect of the reform.[225]

Despite the tumultuous atmosphere the legislator continued and, against all odds, managed to reach an early second reading agreement. The Council adopted its position at first reading in June.[226] The very same day the rapporteur *Marinho e Pinto* distributed widely a bundle of documents among which figured a paper by the CJ, containing statistical information in order to prove the necessity and proportionality of the reform. Nevertheless, the rapporteur also distributed another document, consisting of a commentary of the CJ's paper by GC Judge *Berardis*, commissioned by the rapporteur himself. The latter document disputed, with strong language, the information provided for and the conclusions drawn by the CJ. This, for understandable reasons, made President *Skouris* furious.[227]

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[223] According to him, only the cases exceeding the normal timeframe of 24 months constitute a "backlog". A link to all the interventions can be found through *Heath (2015b).*

[224] See *Robinson (2015d).*

[225] A scanned version of the letter is inserted in the blog post referred to in the previous footnote.

[226] Doc. 9375/1/15.

[227] President *Skouris* took immediate action against Judge *Berardis,* see *Robinson (2015e)*. Later Judge *Berardis* was summoned to appear before a "code of conduct committee convened by the President of the Court of justice", the legal basis of which was not clear [see *Dehousse (2016a)*, 38]. The following year the CJ adopted of a "Code of Conduct for Members and former Members of the Court of Justice of the European Union, OJ 2016 C 483, p. 1). The Code contains rules concerning *inter alia* discretion and the duty loyalty of members towards the institution. Article 6(4) of the Code stipulates that "[m]embers shall refrain from making any statement outside the Institution which may harm its reputation" and Article 7(2) that "[m]embers shall comply with their duty to exercise discretion in dealing with judicial and administrative matters". The task of ensuring the proper application of the Code is entrusted to the care of the president, assisted by a consultative committee composed of the three members of the CJ who have been longest in office and the vice-president (Article 10).

However, despite the efforts of the rapporteur and the GC judges to hamper the project, the proposal was finally largely supported by the political groups.[228] The plenary adopted the legislative resolution of the European Parliament on 28 October 2015[229] and the Council approved the act on 3 December 2015.[230] The Commission gave its positive opinion on 12 November 2015.[231] The act (Regulation 2015/2422 contained the amendments to Protocol No 3 on the Statute as to the number of judges, as well as the necessary transitional measures) was signed on 16 December and published on Christmas Eve.[232]

Unlike many other acts that are results of a difficult process, Regulation 2015/2422 is actually quite clear and simple. Article 48 of the Statute, concerning the composition of the GC, is replaced by a text whereby the GC shall consist of 40 judges as from 1 September 2015, of 47 judges as from 1 September 2016 and of two judges per Member State as from 1 September 2019. Recital 9 of the preamble of the Regulation 2015/2422 discloses that the seven posts of extra judges in September 2016 are transferred from the CST. The only real signs indicating that there were controversies surrounding the process are in the recital 13 as well as Article 3 of the Regulation 2015/2422 according to which the CJEU is expected to draw two reports; by 26 December 2017 on "possible changes to the distribution of competence for preliminary rulings" and by 26 December 2020 on the "efficiency of the General Court, the necessity and effectiveness of the increase to 56 judges, the use and effectiveness of resources and the further establishment of specialised chambers and/or other structural changes." The handprint of the European Parliament is visible especially in recital 11 of the preamble, stressing the need to ensure gender balance within the GC.

[228] See *Alemanno and Pech (2017)*, p. 139.
[229] P8 TA(2015)0377.
[230] See the press release of the Council meeting, No 886/15.
[231] Opinion of the Commission pursuant to Article 294(7)(c) of the TFEU, on the European Parliament's amendments to the Council's position on the proposal for a Regulation of the European parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union, COM(2015) 569 final of 12.11.2015.
[232] Regulation (EU, Euratom) 2015/2422 of the European Parliament and of the Council of 16 December 2015 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ 2015 L 341, p. 14.

4.3 The implementation of the reform

The formal implementation of the reform was simple; the CJ had presented a new proposal containing the amendments necessary for the transfer to the GC of the jurisdiction at first instance in staff cases already before the formal adoption of the reform, in November 2015.[233] The handling of this proposal (that was more of a technical formality at this point) was quite simple and Regulation 2016/1192 was approved by the legislator in first reading in July 2016[234], allowing the abolition of the CST according to the original time table on 1st September 2016.

However, as was to be expected, the concrete implementation of the reform, that is the nomination of new judges, did not proceed exactly in the time-table provided for in Regulation 2015/2422. Without going into detail on the numerous problems related to different candidatures and the transfer of posts from the CST it can be summarised that although eleven of the twelve additional judges provided for under the first stage of the reform were appointed in the course of 2016, the last (Slovak) appointment was still missing as of May 2018.[235] However, the second phase, directly related to the abolishment of the CST, was completed in 2017.[236]

Finally, the expansion of the GC also had a less debated physical aspect: President *Lenaerts* told in his foreword of the Annual Report 2016 that the first stone of the "third tower" of the CJEU buildings was symbolically laid on 27 June 2016.[237]

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[233] Doc. 14306/15, Proposal for a Regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants.
[234] Regulation (EU, Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants, OJ 2016 L 200, p. 137.
[235] The Annual Report of the CJEU 2016, p. 8 and the Annual Report of the CJEU 2017, p. 12.
[236] The Annual Report 2017, 10. It should be stressed that formally only the *posts* of judges, not the individual judges, were transferred from the CST to the GC (although some Member States chose as their candidate the person who had their nationality and was judge at the CST at the time of its abolishment).
[237] Annual Report 2016, p. 9.

5 Assessment of the latest reform

As the previous sections have shown, the structure of the CJEU has, unlike that of the other main institutions of the EU, been changed several times over the years to meet the new challenges brought by, most importantly, expansions of the EU's area and of its powers. The main reason behind all the modifications of the CJEU has been the need to give the judiciary tools to better handle its constantly growing case load. The latest reform, however, seems to differ from the previous ones in one important aspect: the unprecedented wave of critique it has faced. Therefore, the CJEU not only has to make the reform work successfully, but also convince the outside world that it works.

5.1 An overview of the discussion following the reform

This section is devoted to an overview of what has been written of the reform. The general tone of these comments is negative; the reform has been criticized "with a level of animosity hardly envisaged in past debates about the Union's judicial system"[238] and most of the positive comments have been made by people representing the CJEU itself (although even among them there have been those who have criticised it). In addition to contributions by outside commentators, as explained earlier in section 4.2.4, the cross-blaming between the representatives of various institutional actors involved in the process reached a nearly tragicomic level.

Throughout the legislative procedure the press and the blogosphere, usually not very interested in the organisational structure of the CJEU, have feasted on the details of this lengthy drama, remembering to bring into daylight not only the inability of the legislator to reach an agreement but also the embarrassing disagreements inside the CJEU. The titles of the various articles and blog posts speak for themselves: "Don't mention the extra judges! When CJEU reform turns into farce"[239], "*La justice européenne au bord de la crise de*

[238] *Sarmiento (2017),* p. 236.
[239] *Peers (2015).*

nerfs"[240], "The 1st rule of the ECJ's fight club… is about to be broken"[241], "*Guerre des nerfs sur les moyens de la Cour de justice européenne"*[242] and "Where do we stand on the reform of the EU's Court system? On a reform as short-sighted as the attempts to force through its adoption"[243]. As regards academic articles, *Alemanno* and *Pech* have published[244], in addition to numerous blog posts and press articles, an extensive and highly critical piece in which they present their views on all the things that went wrong[245] and *Sarmiento* has contributed with a somewhat more positive and constructive article.[246]

However, the most eager commentator and critic has throughout the process been Judge *Dehousse* (judge in the GC from 2003 to 2016) who between 2011 and 2017 published a series of four exhaustive papers in which he criticizes the reform from all possible angles.[247] The intensity of his critique and lobbying against the reform while still employed by the GC as well the fact that he now has filed an action before the GC against the CJEU for not giving him access to certain documents containing information on the internal (mis)management of the latter[248] lead one to think that a person who clearly is on a quest against his former employer might not be the most objective commentator. Still, as a former longstanding GC judge he undeniably is in a position to analyse the reform and its possible consequences.

5.1.1 On the process

The process leading to the adoption of the reform has been criticised heavily. The conduct of the Commission, the Council and the European Parliament has been condemned by many writers. That fact that initially these institutions thought that 12 or 9 was an appropriate

[240] *Quatremer (2015).*
[241] *Robinson (2015c)*
[242] *Ducourtieux (2015).*
[243] *Alemanno and Pech (2015b).*
[244] See, for instance, *Alemanno and Pech (2015a)* and *Alemanno and Pech (2015b).*
[245] *Alemanno and Pech (2017),* p. 131.
[246] *Sarmiento (2017),* pp. 236–251.
[247] *Dehousse (2011), Dehousse (2016a), Dehousse (2016b)* and *Dehousse 2017.*
[248] According to the media the documents in question relate to the cost of IT projects and information on the use of chauffeurs by judges while on holiday as well as recruitment procedures for jobs that were not advertised publicly. See *Hirst (2017).*

number of extra judges but ended up accepting 28 of them (or 21, if the posts transferred from the CST are deducted), for the simple reason of the Council not being able to create a rotation system and precisely at the time when the GC had managed to boost its effectiveness significantly[249], was not left unnoticed by commentators.[250] The Member States' behaviour in the Council has been generally judged as egoistic, and also tragically descriptive of the current state of the EU.[251] It has also been claimed that the essential procedural requirements were interpreted if not in an illegal, at least in an unorthodox manner by the legislator. The commentators also brought into daylight the chronological hick-ups of the process, such as the opinion of the Commission being based on the original proposal of 2011, materially very different from the proposal of October 2014, and the upgraded proposal of 2014 not being forwarded to national parliaments.[252] Moreover, the process has been said to lack a transparent and informed debate. It has been said that the legislative procedure was conducted by the legislator too hastily and in secret, by ignoring some of the basic procedural requirements such as the relevant persons having the necessary language versions at their disposal.[253] Finally, both the Commission and the Council have been obliged to comment their lack of action concerning an impact assessment study and a proper cost-benefit - analysis, following written questions from MEP's.[254]

In addition to outside commentators, also the representatives of the CJEU have criticised the legislator. The frustration of President *Skouris* towards the legislator can be discerned from the various letters that he addressed to the changing Council presidencies and to the

[249] See *infra* sections 5.1.2 and 5.2.1.

[250] See, for instance, blog posts *Peers (2015)*, *Abenhaïm (2014b)* and *Alemanno and Pech (2015b)*.

[251] In addition to previously mentioned writings, see *inter alia Robinson (2015a)* and EP Committee on Legal Affairs, António *Marinho e Pinto* (rapporteur): Draft recommendation for second reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD)), points 3-5 of the explanatory memorandum. The rapporteur stressed that judges are not commissioners from Member States.

[252] *Alemanno and Pech (2017)*, pp. 148−150. The writers claim that the failure to treat the proposal of October 2014 as a new formal proposal and forward it to national parliaments "undermines the legitimacy if not the procedural legality of Regulation 2015/2422".

[253] *Alemanno and Pech (2017)*, pp. 146−148.

[254] *Jozo Radoš* (ALDE), Question for written answer to the Council, Subject: More judges for the Court of Justice: impact assessment, 13 May 2015, E-007778/2015 and the reply of the Council, as well as *António Marinho e Pinto* (ALDE), 23 March 2015, E-004583-15, and the reply of the Commission.

European Parliament throughout the process, trying to convince them of the urgency of the situation and suggesting solutions. President *Jaeger* has not stayed silent either. He described in a conference held in 2014, when the whole project seemed to be stuck, his personal feelings towards the legislator with the expressions "big waste [of time and energy]", "profound perplexity" and "light irritation". He especially expressed his bewilderment over the fact that the Member States were not able to agree on a method of distribution of posts in a situation as critical as the one at hand. Another thing that irritated him was the conduct of "certain institutional actors" that were trying to intervene in the way the GC organises itself internally.[255] By this he doubtlessly referred to the Commission that had in various occasions suggested ways to improve the efficiency of the GC maintaining *inter alia* that the creation of specialist chambers in the GC is a must.

However, the CJEU was not only a critic of the process but also the subject of criticism itself. As explained *supra* especially in sections 4.2.4 and 4.2.5, there were severe disagreements inside the CJEU as to the basic solutions of the reform. Several writers highlighted the disputes between the two presidents remarking that the manner in which President *Skouris* was leading the project painted the image of an authoritarian institution in which dissenting voices are silenced.[256] Moreover, one writer even weighed in a conspiracy theory according to which he had persuaded Germany to give its support to the CJ's new proposal by offering in exchange a positive outcome in the so called *Gauweiler*[257] case.[258] The manner in which the proposals for changes of the Statute are prepared inside the Council has also been criticised as being distorted for the advantage of the CJ.[259] Finally, as the Council and the Commission, also the CJEU has been criticised for its reluctance to conduct a meaningful impact assessment study and a serious costs/benefits analysis of the possible solutions.[260]

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[255] CCBE, Proceedings of the Conference "EU Courts – Looking Forward", pp. 43−44.
[256] See, blog posts *Peers (2015), Robinson (2015c), Alemanno and Pech (2015a)* and *Robinson (2015d).*
[257] A preliminary reference presented by the German constitutional court, Case C-62/14, *Gauweiler*.
[258] *Quatremer (2015).*
[259] For a detailed description of the institutional debate surrounding the reform see *infra*, section 5.2.6
[260] See, for instance, *Alemanno* and *Pech (2017),* pp. 143−145 and *Croft (2014)* (referring to a speech by Judge *van der Woude*).

As for comparative analysis, Judge *Dehousse* devoted his third Egmont paper, "The Brilliant Alternative Approach of the European Court of Human Rights"[261] to comparing the reform process to that of the ECtHR, which he describes as being conducted in a more democratic, inclusive and transparent manner (resulting in a reform that was "more global, more economical and more flexible").[262]

5.1.2 On extra judges

Already before the latest reform, several authors had had doubts about adding the number of judges and had expressed fears as to the operability of a court composed of a significantly bigger number of judges than there are Member States. *Van Gerven* warned already in 1996 against the creation of a "mammoth court", talking about the "fatal spiral of one judge per Member State regardless of objective needs" that may "even lead to duplication". He also referred to Judge *Koopmans* who has claimed that the number of judges and advocates general is one of the worst methods of increasing productivity.[263] *Iannone* asked in her article in 2005 if a Court composed of 30 or so members does not risk losing the coherence necessary to ensure the uniform interpretation of the rules of the legal order that is already characterised by a large heterogeneity, drawing attention also to the fact that such a large court no longer is able to sit in plenary session.[264]

As regards the reform at hand, in addition to these concerns of a more general nature, many commentators noted the fact that the GC had been able to take a big productivity leap in the years preceding the reform without the help of any extra judges.[265] Whereas the GC in 2010 was able to complete 527 cases, in 2015 its productivity had augmented so as to allow the completion of as much as 987 cases. This staggering development was the result of a series of internal measures taken by the GC throughout the past ten years in order to make its work

[261] *Dehousse (2016a).*
[262] *Dehousse (2016b).*
[263] *Van Gerven (1996),* pp. 217−218.
[264] *Iannone (2005),* p. 163.
[265] See e.g. *Peers (2015)* and *Alemanno and Pech (2017),* pp. 152−155.

more effective, such as the possibility of ruling on intellectual property cases without a hearing, the implementation of a monitoring system regarding the respect of internal deadlines, the reform of writing methods of various judicial documents, and the development of new technologies in the daily exchange of documents[266] as well as the recruitment of nine additional legal secretaries (one per Chamber) at the beginning of 2014.[267] In addition, the press in some Member States raised the price tag of the reform into the public sphere in a vociferous manner.[268]

Hence, it was no surprise that many, among them a group of GC judges and the rapporteur of the European Parliament for this file, *Marinho e Pinto,* stated that the addition of judges was disproportionate and unnecessary. According to the rapporteur no one could, in good faith, believe that the expensive exercise of doubling the number of judges is in any reasonable relation with the problem of outstanding GC cases.[269] According to some, a reform package consisting of the appointment of more staff at the registry or translation services and/or more *référendaires*, would have satisfactorily addressed the problems identified by the CJ at a significantly lower cost.[270]

In addition, there were those who claimed that the current problems of the GC do not actually stem from its case load, but are rather linked to questions of a more administrative nature, relating to for instance lack of stability in the composition of the GC, problems in its general case management as well as challenges of multilingualism.[271] Many thought that the real challenge facing the GC is more qualitative than quantitative in nature[272] and were of the view that adding the number of judges in the GC was a "yesterday's solution to yesterday's problems", as the four rebellious GC judges appearing before the European Parliament

[266] See *Jaeger (2017),* p. 25.
[267] The Annual Report of the CJEU 2014, p. 123.
[268] See e.g. *Mendick (2014)* and *Kanter (2016).*
[269] *See* EP Committee on Legal Affairs, *António Marinho e Pinto* (*Rapporteur*): Draft recommendation for second reading on the Council position at first reading with a view to the adoption of a regulation of the European Parliament and of the Council amending Protocol No 3 on the Statute of the Court of Justice of the European Union (09375/1/2015 – C8-0166/2015 – 2011/0901B(COD)).
[270] *Alemanno and Pech (2017),* pp. 172−174 and *Abenhaïm (2014b).*
[271] See e.g. *Alemanno and Pech (2015a)* and *Dehousse (2011).*
[272] *Alemanno and Pech (2015a)* and *Abenhaïm (2014a).*

snapped (see *supra* section 4.2.6). Moreover, president *Jaeger* himself stated that "[t]here are more appropriate, more effective and less onerous means by which to strengthen the General Court and to achieve better and even faster outcome for litigants."[273] He also drew attention to the problems that the increased input from the GC could cause to the CJ as well as to the burden that the expansion of the GC will cause to the administrative services such as translations, interpretation and registry.[274]

Finally, the inflexibility of the solution based on adding judges has been brought up. Even though the CJ in its proposal presented the addition of judges as the more flexible option compared with the creation of specialised chambers, in practice the abolishment of existing positions of judges is, in political reality, an unlikely event.[275]

5.1.3 On the abolition of the CST

The abolition of the CST came somewhat as a surprise because this organ is considered a success in many ways. The CST coped well with its workload and was praised especially for enhancing the protection of fundamental rights of workers and protection of temporary staff against dismissal[276]. The CST introduced indirect applicability of directives in relations between the institutions and their staff[277], improved the objectivity of selection procedures of the personnel[278] and alleviated the burden of proof imposed of the plaintiff in cases concerning psychological harassment.[279] Among the general merits of the CST have also been mentioned the speediness of its procedures[280], good procedural economy and productivity[281] and benefits brought by specialized judges. *Vandersanden* has stated that putting emphasis by the selection committee on candidates' specialisation to European civil

[273] See *Robinson (2015a).*
[274] *Jaeger (2017),* p. 36.
[275] See *Dehousse (2011),* p. 29.
[276] Case F-1/05, *Landgren* v *ETF*. See *Delhaye and Lhoëst (2010),* p. 2.
[277] Case F-65/07, Aayhan *and Others* v *Parliament.* See *ibid*. in p. 4 and *O'Leary (2011),* p. 774.
[278] Case F-52/05, *Q v Commission.* See *Delhaye and Lhoëst (2010),* p. 5 and *O'Leary (2011),* p. 778.
[279] *Ibid.*
[280] *O'Leary (2011),* p. 786.
[281] *Kraemer (2009),* p. 1892 and *Dehousse (2011),* pp. 27−28.

service law, administrative law and social law led to the CST developing to a "high-quality jurisdiction that gave new and enriching impulse to European civil service case law".[282]

Hence, it was to be expected that the decision to abolish the CST raised critical comments. First, there were comments of an institutional nature, referring to Article 19 TEU according to which "[t]he Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts" and Article 257(1) TEFU that lays down the procedure for the establishment of special tribunals. At the time of the establishment of the CST the general presumption was that this was only the first of several special tribunals and that the structure of the community judicature would in the future be three-level.[283] Thus, the proponents of the preservation of the CST have claimed that observing the spirit, or even the letter, of the Treaties demands that there be three layers to the CJEU. It has also been questioned whether there is a legal basis for abolition of a special tribunal.[284]

Secondly, the practical consequences of the abolishment have been debated at length. Especially the representatives of the users of the CST regretted the abolishment. The *Union syndicale fédérale des Services publics européens et internationaux* gave in a resolution its strong support to preserving the CST, underlining the fact that its judges were chosen taking account of their specialisation in civil service law and social law, which would be lost in the GC[285], whose judges tend to be business-law oriented generalists.[286] The EPSU (European Public Service Union) has also been deeply concerned about the future of the civil service litigation in the EU, noting inter alia that "in a court in which Economic Law and huge

[282] *Vandersanden (2015),* p. 88.
[283] See e.g. *Lavranos (2005), Dehousse (2011),* p. 30 and *Rosas − Kaila (2006),* p. 78. See also *Lotarski (2004),* p. 721.
[284] See e.g. *Alemanno and Pech (2017),* pp. 150−152. In addition to their own views the authors point out that MEP *Marinho e Pinto* as well as trade unions have deplored the fact that the will of the fathers of the Treaties has not been respected (see for instance the letter of *Union syndicale fédérale des Services publics européens et internationaux* addressed to the European parliament on 9 July 2015).
[285] "Resolution on the recasting of the EU's judicial framework and the planned abolition of the Civil Service Tribunal" approved by *Union syndicale fédérale des Services publics européens et internationaux* in its congress in Dubrovnik on 4-5 May 2015.
[286] See the letter of *Union syndicale fédérale des Services publics européens et internationaux* addressed to the European parliament on 9 July 2015 and a statement approved by the Federal Committee meeting in Frankfurt on April 23, 2016.

financial stakes prevail, Civil Service cases would look like a poor relative, unrewarding for the judges who would be placed in these Chambers".[287]

On the other hand, some have recognised the repeated problems in nominating the judges for the CST as a valid argument pleading for its abolishment and for rejecting the option of creating more special tribunals. As one commentator stated in relation to this question: "There's no point hoping that national egos will go away; they won't".[288]

However, it is noteworthy the CJ in its proposal did not touch upon the institutional significance of the abolition of the CST nor the effects it would have for the legal protection of civil servants. It only referred to the fact that ever since its establishment there have been growing disagreements as to the role of the committee responsible for examining applications and the application (or not) of the rotation principle. President *Lenaerts* has also unofficially stated that there were years when the CST only had little work.[289]

It is well known that the GC was opposed to the abolishment of the CST. It was a complete opposite of the solution preferred by the GC, consisting of creating more special tribunals alongside the CST to solve its workload problem. In addition, without the CST the GC ceased to be an appellate court, which President *Jaeger* has considered to be an essential feature of the present-day architecture of CJEU.[290] It is interesting to note, however, that the CST itself did not oppose to its abolishment but obediently aligned its position with the CJ.[291] Perhaps the CST simply acquiesced to the proposal of the CJ because that is how the system works from an institutional point of view. Or maybe *Peers* was right in suggesting that the judges of the CST, after years of dealing with civil service cases, were actually looking

[287] A memorandum of the EPSU of 14 December 2014, "No to abolishing the CST!". The same view seems to be shared by *Peers* according to whom "EU judges look forward to dealing with civil service cases about as much as a cat looks forward to a bath", *Peers (2014).*
[288] *Peers (2015).*
[289] *Teffer (2016).*
[290] *Jaeger (2017),* p. 16.
[291] See Council doc. 14448/1/14, containing the upgraded proposal of the CJ, according to which the plenary meeting of the CST had expressed itself to be in favour of the proposal.

forward to ruling also on “bolshy Belarussians and money-grubbing monopolists” rather than keeping their own court.[292]

5.1.4 The plea of the defence

The CJ openly admitted both in its upgraded proposal of 2014 and in other occasions that the magical number 28 follows from the fact that any other number of extra judges turned out to be a political no-go. However, it has persistently held that this is not a disproportionate number, at least not in the long run. The CJ stated in its press release in April 2015 that the proposal not only meets the immediate needs of the GC, but also seeks to strengthen the effectiveness of the European Court system as a whole in a sustainable manner.[293]

Naturally, President *Lenaerts* has been persistently defending the reform in different fora. In the foreword of Annual report of the CJEU 2015 he assured that the reform will enable the institution to "continue to fulfil its task in the interests of European litigants while meeting the objectives of quality and efficiency of justice."[294] In early 2016 he also explained the advantages of the reform in a couple of interviews he gave to the press, stressing that the reform is all about giving the GC the necessary tools to take seriously its role as the "High Court of the Union"[295], *inter alia* by enabling deliberation in larger formations than the usual three judges.[296]

After the adoption of Regulation 2015/2422 also President *Jaeger* has, at least in public, overcome his scepticism – which of course is the only feasible way to act for the president of the institution concerned. In April 2016 the two presidents spoke together for the press and explained the reform. As regards the workload of the GC they pointed out that that even if the number of new cases has not increased every year, if you take medians of three years, it is

[292] *Peers (2014).*
[293] Court of Justice Press Release No 44/15 (Luxembourg, 28 May 2015).
[294] “Foreword”, Annual Report of the CJEU 2015, pp. 4–5.
[295] *Seytre (2016).*
[296] *Ducourtieux (2016).*

increasing, and that also new policy themes like the Banking Union will lead to increase litigation in the GC.[297] In the same occasion also Judge *Rosas*, while understanding the critique, stated as his view that in 5-10 years' time the addition of judges might prove adequate.[298]

Some commentators have also made an effort to see the bright side of the reform and to adopt a constructive stance. *Sarmiento* stated in his blog post following the formal adoption of the Regulation 2015/2422 amending the Statute that "the reform is now part of our lives and we should start learning how to cope with it, as lawyers, as academics, as judges and as civil servants".[299] He stressed that if wisely managed, the reform could be the institution's chance to become the "judicial hegemon that many wish the Court to become". Also, according to *Weiler*, the reform could end up being a "blessing in disguise."[300]

5.2 The coming years

As the previous section shows, the reform has been subject to unprecedented criticism. Irrespective of whether this critique is justified or not, it is a fact. The critics will most probably not forget the reform but continue to monitor with a great deal of interest how the new resources are used. In addition, Regulation 2015/2422 itself obliges the CJ in its Article 3(1), with the aid of an external consultant, to draw up a report focusing on the efficiency of the GC, the necessity and effectiveness of the increase of judges, the use and effectiveness of resources and the further establishment of specialised chambers and/or other structural changes. Thus, the scrutiny that the CJEU will face in coming years in the implementation of the reform is bound to be intense. This section will shed light on the various matters the CJEU will have to consider in the coming years.

[297] *Teffer (2016).*
[298] *Ahtela (2016).*
[299] *Sarmiento (2015c).*
[300] *Weiler (2016).*

5.2.1 Statistics under the magnifying glass

It follows from the recitals of Regulation 2015/2422 that the main objectives of the reform relate in the first place to reducing the volume of pending cases and the excessive duration of proceedings. Thus, although the reform process has painstakingly shown that statistics can be interpreted in very different ways[301], in the coming years the figures provided by the CJEU on its workings will be monitored meticulously. It follows from the aforementioned objectives of the reform that the key performance indicators for the reform's success will be the number of pending cases as well as the average duration of proceedings.

It is of course way too early to properly measure the success of the reform. It is also valid to ask whether 26 December 2020, the dead-line for the report provided for in Article 3 of the Regulation 2015/2422, is also too early. The last batch of extra judges will only start their work in autumn 2019 and at no point was it even expected that the reform would result in immediate positive effects; the challenges brought by such an upheaval of an organ have been recognised and it may therefore take even years for the reforms to begin to have any positive impact from the parties' point of view.[302] However, a quick glance at the relevant statistics is justifiable and provides interesting information even at this point.

As regards the duration of proceedings, the GC clearly has managed to cut down the handling times recently. Whereas the average duration of all cases in 2013 was 26.9 months, in 2017 it had narrowed down to 16.3 months.[303] Whatever the case may be, in competition cases, for instance, the fall from 50.5 months in 2011 to 21.6 months in 2017 is remarkable and constitutes a major improvement from the point of view of the European economy. Even though this tendency of declining handling times has been visible already before the reform (in 2015 the average duration had dropped to 20.6 months), and is partly due to the internal

[301] See for instance Annex I and II *Dehousse (2016a).* Annex I contains a memorandum provided by the CJ to the Council and the European parliament concerning the statistics of recent years and the dramatic conclusions to be drawn from them, and Annex II a commentary by Judge *Berardis*, putting into question both the way these statistics were presented and the conclusions drawn therein.
[302] *Abenhaïm (2016).*
[303] Even though part of it is explained by the fact that in its new area of competence, the staff cases (a total of 107 cases), the average duration was only 8.9 months.

measures adopted in the past years as well as the entry into force of the new Rules of Procedure[304], at least part of it is attributable to the reform.

However, as regards the number of pending cases the effects of the reform do not seem to have kicked in yet.[305] These figures, retrieved from the Annual Reports of the CJEU of 2013 and 2017, show the evolution of the key figures as regards the number of cases.

	2009	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
New cases	568	636	722	617	790	912	831	974	917
Completed cases	555	527	714	688	702	814	987	755	895
Pending cases	1 191	1300	1 308	1 237	1 325	1 423	1 267	1 486	1 508

Hence, contrary to the objectives of the reform, the stock of pending cases kept growing also in 2016 and 2017. The explanation for this phenomenon is simple: while the number of incoming cases keeps increasing, the effectiveness of the GC has not improved much despite the arrival of a large number of extra judges. Year 2016 was especially detrimental in this respect; whereas the number of incoming cases was 974, the GC only managed to complete 755 cases. This is quite understandable considering that a total of 22 new judges started to work in the house that year.[306] In 2017 the ratio was already much better; 917 new and 895 completed cases. Still, considering that the composition of the GC remained quite stable throughout the whole year, with only two new judges, 2017 could have expected to be a more productive year and allowed the GC to start reducing the stock of pending cases.

[304] Rules of Procedure of the General Court, of 4 March 2015 (OJ 2015 L 105, p. 1).
[305] It should be clarified that the stock of pending cases is not the same thing as a backlog, which is a term often used during the reform process. In a court there is always a stock of cases to be dealt with. However, a "backlog" has been defined as the number of cases which are in a state of proceedings to be dealt with and in which the internal deadlines for issuing the preliminary report are exceeded and in which the latter document has still not been issued due to a lack of capacity of the reporting judge and/or the respective Chamber (A note from the Cypriot presidency, Reform of the General Court – Factual information, doc. 14916/12, 15.10.2012, at paragraph 3).
[306] See the Annual Report of the CJEU 2016, p. 124.

One cannot help but notice that whereas in 2015 the GC was able to close an average of 35 cases per judge[307], in 2017 the corresponding figure was only 20 cases.[308] The productivity, measured this way, in 2017 actually corresponds to 2010, before any of the internal measures taken by the GC to enhance its productivity had been launched[309] and is quite far from the internal target of the GC of 25 cases completed/judge/year.[310] Hence, even though the individual cases now seem to be dealt with more expeditiously than before, this has strangely not resulted in cabinets being able to absorb more cases but quite the contrary.

However, it is fair to wait a couple of years and let the GC find its new ways of working before jumping into far-reaching conclusions. President *Jaeger* states in the Annual Report of 2017 that 2018 should be the year when the GC will reach its new "cruising speed".[311] The figures of the following years will certainly be monitored with great interest, both by commentators and by the external expert that will be chosen to draw up the report referred to in Regulation 2015/2422.

5.2.2 Internal organisation and case management

When assessing the future of the GC and the success of the reform, one of the most crucial questions is how it is going to organise itself internally. As regards internal organisation and case management, the doubling of the number of judges opens a wide range of new possibilities that should be examined in a constructive and open manner. It seems clear that a court consisting of 56 (or 54 after "Brexit") members simply cannot work essentially the same way as one consisting of 28 members.[312]

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[307] 987 cases / 28 judges.
[308] 895 cases / 44 judges (leaving aside the two judges that took office in the course of that year). Year 2015 was of course an exceptional year when the GC gathered all its efforts, but also in 2014 the ratio cases completed / judge was 29 cases.
[309] For a detailed description of these measures, see *Jaeger (2017),* pp. 25−29.
[310] A note from the Cypriot presidency, Reform of the General Court – Factual information, doc. 14916/12, 15.10.2012,
[311] Annual Report of the CJEU 2017, p. 138.
[312] See *Sarmiento (2015c)* and *Öberg, Ali* and *Sabouret* according to whom "increasing the number of judges in a vacuum, without additional structural reform, does not sufficiently address the changing nature of litigation before the General Court and its increased level of complexity" [*Öberg, Ali and Sabouret (2018),* p. 218].

The GC has obviously already taken some measures of internal organisation to accommodate to the new situation. Whereas the GC until September 2016 was composed of three judge chambers, it now consists of nine five-judge chambers (which can sit either with five judges or with two sub-formations of three judges).[313] The purpose of this change is to enhance the use of five judge chambers, even though a chamber sitting with three judges still remains the ordinary formation of the GC.[314] This novelty will certainly result in enhancing the quality and the legitimacy of the work of the GC, but this might take some time. The GC is used to working in three-judge chambers and deliberating in a larger chamber always signifies a more complicated and lengthy decision-making process.[315] Also, the exact criteria for allocating a case to a five-judge chamber are still unclear.

In addition, some measures relating to internal management of the GC have been carried out, especially regarding the vice-president. The GC decided in 2016 to trust him with the task of developing a "hub" concentrating on cross-cutting legal analysis with a view to enhancing the consistency and quality of the case-law of the GC.[316] Moreover, the GC decided that the vice-president shall be a member of the grand chamber of the GC[317] and that when a judge is prevented from acting, the vice-president will replace him.[318]

However, the most interesting step so far has been the proposal, made by the GC in March 2018, to amend its Rules of Procedure so as to empower the vice-president to perform the functions of advocate general.[319] This would be a historic change, as even though the Treaties

[313] Alongside those nine chambers, the Appeal Chamber, which has jurisdiction to rule on appeals brought against decisions adopted by the Civil Service Tribunal before it was dissolved on 31 August 2016, continued to exercise its functions. In all likelihood, that chamber will cease to exist at some point in 2018 once it has adjudicated on the final appeal cases still pending. (Annual Report of the CJEU 2017, p. 138).
[314] The Annual Report 2016, p. 125.
[315] *Sarmiento (2017)*, p. 241.
[316] Doc. 7068/18, Draft amendments to the Rules of Procedure of the General Court, p. 1.
[317] Composition of the Grand Chamber, OJ 2016 C 296, p. 3.
[318] Method of designation of the Judge replacing a Judge prevented from acting, OJ 2016 C 296, p. 2.
[319] Doc. 7068/18, Draft amendments to the Rules of Procedure of the General Court. The same document contained also the empowerment of the vice-president to put proposals to the plenary for cases to be referred to formations composed of more than three judges.

have always allowed for the GC to be assisted by advocates general[320] this provision has practically remained a dead letter.[321] At the time of the establishment of the CFI, the CJ was of the opinion that permanent advocates general were not necessary because the intended role of this court was limited to special categories of cases and hence, did not include "development of EU law".[322] This reasoning obviously is no longer valid.

Even though the Nice Treaty did away with the compulsory use of an advocate general in every case in the CJ[323], their crucial role in cases posing new and difficult questions of law is widely recognised.[324] Their added value has been neatly summarised by the Advocate General *Van Gerven* according to whom an advocate general not only shows the way in which he believes that the Court should follow, but also plays a role in clarifying the Court's case law to the advantage of the legal community as a whole and makes it more transparent and democratic.[325] The opinion of an advocate general contains a more detailed exposition of the factual and legal background of the case than the judgment and can even include contemplations concerning different possibilities for a solution and alternative arguments or a comparative analysis of the laws of Member States.[326]

Hence, it would seem only logical to start assigning an advocate general in the most interesting and important cases also in the GC, especially as the GC now is committed to

[320] According to Article 254 TFEU the Statute may provide for the GC to be assisted by advocates general and Article 49 of the Statute and Article 3 of the Rules of Procedure of the General Court include the provisions enabling the use of this possibility.
[321] The only examples of the use of an advocate general in the GC are dated in the first three years of its existence. *Tridimas (1997)*, p. 1384.
[322] *Tridimas (1997)*, p. 1383.
[323] Along with the increase of the number of advocates general from eight to eleven in 2015 their use has been in increase. Whereas in 2014 approximately half of the judgments were delivered without the opinion of an advocate general (Annual Report of the CJEU 2014, p. 10), in 2015 the corresponding figure was 43 % (Annual Report of the CJEU 2015, p. 10) and in 2017 only 33 % (Annual Report of the CJEU 2017, p. 98).
[324] *Sarmiento*, for instance, describes the advocate general as an "essential tool in keeping the machinery of the Court (and its authority) running smoothly" [*Sarmiento (2015b)*] and *Tridimas* underlined in his article in 1997 the vital role that the advocates general play in the development of Community Law [*Tridimas (1997)*, p. 1385].
[325] *Van Gerven (1996)*, p. 222.
[326] *Tridimas (2018)*, p. 589.

enhancing the overall quality of its judicial work.[327] If infringement cases would be transferred to the GC, as recently proposed by the CJ (see *infra*, section 5.2.3), the introduction of advocates general in the GC could also add the legitimacy of the decision making and thus, make it easier for Member States to accept the transfer of competence.

However, the inevitable question is whether the current proposal is a bit too modest. Why not institutionalise the system once and for all and to nominate several judges to act (solely) as advocates general? Also, although the possibility of the vice-president acting as advocate general might seem a good idea from the perspective of preserving the uniformity of jurisprudence, this solution does not sit well with the requirement of "complete impartiality and independence" of an advocate general, provided for in second paragraph of Article 252 TFEU. As *Tridimas* has stated, the independence of an advocate general from judges is of a cardinal importance.[328] Hence, nominating certain "ordinary" judges to perform the task of an advocate general for a longer period of time and to free those persons temporarily from duties of judge would seem a preferable solution.[329]

One of the hot topics related to the internal organisation is *specialisation* inside the GC. This is a question that has been discussed for long, much before this reform was launched.[330] The Commission pleaded for specialisation already in its guidelines concerning the establishment of the CFI in 1988 where it suggested both for the creation of two specialised chambers (for economic and staff cases respectively) and for the recruitment of judges specialised in these areas.[331] This proposal was logical considering that the CFI in the beginning was a specialist court with competence only on these two areas. However, also different commentators have throughout the years called for at least a discussion on possible specialisation inside the

[327] See Report of the Court of Justice on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU, doc. 15995/17, p. 9 and the Annual Report of the CJEU 2016, text written by President *Jaeger*, p. 104.
[328] *Tridimas (2018)*, p. 590. *Arnull* has also doubted whether a person normally working as judge would be "able to approach a case with the necessary degree of objectivity and detachment if called upon to act as an Advocate General". See *Arnull (2006)*, p. 27.
[329] *Tridimas (1997)*, p. 1385.
[330] See e.g the Due report, pp. 49−50 and *Azizi (2006)*, p. 246.
[331] See SEC(88)366 final, Preliminary guidelines adopted by the Commission for the preparation of an opinion on the proposal put forward by the Court of Justice for a Council decision establishing a Court of First Instance (CFI) and amending the statutes of the Court of Justice, 18.5.1988.

GC.[332] Nevertheless, apart from the Appeal Chamber devoted for the examination of appeals from the CST there has really been no response to such propositions in the GC itself.

With the reform this discussion has reached a new level and some have stated that in a judiciary consisting of 56 judges the creation of specialised chambers would not only be a noteworthy possibility but a necessity.[333] It has been maintained that specialisation of chambers would facilitate a flexible management and a thorough review of, in particular, difficult and lengthy cases.[334] The most eager advocate has been the Commission that has persistently been insisting this question in a manner that some have found even intrusive and insolent.[335] Already in its first opinion concerning the reform in 2011 the Commission proposed adding in the Statute a paragraph according to which the GC would be obliged to create at least two specialised chambers. This would, according to the Commission, have ensured in the situation of 12 extra judges a more efficient and rapid handling of cases, while preserving the necessary flexibility.[336] In its opinion concerning the transfer of jurisdiction from the CST to the GC in 2016[337] the Commission took opportunity to note that "[i]t goes without saying that the way the General Court functions will have to be profoundly modified to cope with this new situation" and called for "reflection on the possibilities of adapting the rules and practices governing the allocation of cases by creating thematic synergies". These openings, that gained some support also among the Member States, are reflected in Article 3(1) of Regulation 2015/2422 that explicitly lists the creation of specialised chambers as one of the issues to be considered in the name of efficiency in the report that is to be drafted in 2020.

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[332] See e.g. the interventions of the Agent of the Swedish Government, Anna Falk and of the President of the CCBE delegation to the CJ, Onno Brouwer in the Colloqium "Celebration of 20 years of the Court of First Instance of the European Communities - From 20 to 2020, building the CFI of tomorrow on solid foundations".
[333] *Sarmiento (2015c).* See also the letter of the Registrar of the CJ, *Alfredo Calot Escobar*, sent to the Council presidency in 2011, according to which "it is likely that specialisation of chambers is inherent in a court composed of 39 Judges" (in Council doc. 16904/2011, p. 7).
[334] *Öberg, Ali and Sabouret (2018),* pp. 218−219.
[335] See *Dehousse (2016a),* p. 17 and speech of President *Jaeger* in the CCBE conference (CCBE, Proceedings of the Conference "EU Courts – Looking Forward").
[336] Commission opinion of 30.9.2011 on the requests for the amendment of the Statute of the Court of Justice of the European Union, presented by the Court, COM(2011) 596 final, paragraphs 35-37.
[337] Commission opinion on the proposal for a regulation of the European Parliament and of the Council on the transfer to the General Court of the European Union of jurisdiction at first instance in disputes between the Union and its servants, COM/2016/081 final.

Although the CJ has traditionally been cautious in not interfering with the internal organisation of the GC, it has also referred to this possibility. In its original proposal the CJ underlined the need to reflect, at the same time with the addition of judges, how to make the best use of all the GC's resources, "perhaps through specialisation of certain chambers and flexible case management allocation"[338] and Registrar *Calot Escobar* recognised in his letter addressed to the Council presidency in November 2011 that specialisation is one factor of efficiency. In its upgraded proposal of 2014 the CJ also hinted to the existence of this possibility by listing in the reasoning of its proposal that through the proposed amendments the GC would have "greater flexibility in dealing with cases, since the General Court will be able, in the interests of the proper administration of justice, […] to make certain Chambers responsible for hearing and determining cases falling within certain subject areas".[339]

However, the potential downsides of specialisation have also been debated at length throughout the years. These include *inter alia* the reduction of flexibility in the allocation of cases to chambers[340] and the fact that as there is lots of cross-fertilization in the law governing different areas, the unity and the consistency of the jurisprudence could be weakened.[341] The potential lack of perspective of judges assigned in specialised chambers and the compatibility of the system with the principle of "*juge légal*" have also been brought up, as well as the practical argument that Member States might not accept a system where their judge might not participate in the handling competition cases, considered generally to be the most important ones.[342] Moreover, there would be practical difficulties in creating specialised chambers in a court in which stability is not guaranteed and the appointments can be politically-influenced.[343] Even the humane argument that it might be boring for the judges

[338] Doc. 8787/11, p. 10.
[339] Doc. 14448/11, p. 5.
[340] An EU Competition Court: report with evidence, House of Lords: European Union Committee, 15th report of session 2006-07, paragraph 201.
[341] See Celebration of 20 years of the Court of First Instance of the European Communities 25 September 2009, the speech of Anthony M. Collins, SC, Bar of Ireland and *Dehousse (2011),* p. 25.
[342] "An EU Competition Court: report with evidence", 15th report of session 2006-07, paragraphs 113-122 and *Sarmiento (2017),* p. 243.
[343] *Sarmiento (2017),* p. 243.

to "face the same issues day in and day out" has been raised in the discussion.[344] Consequently, judges could be attracted to take turns between the "fun" chambers and the "boring" chambers in which case the *référendaires* could become attached to specialised chambers instead of judges to ensure certain stability in the case law. This in turn might raise the question of who is ultimately running the place.[345]

The GC itself has been very cautious and tends to refer in this context to the use of the "connection criterion", according to which even though the cases are usually assigned to chambers following a system of rotation, the president may derogate from the rotas in order to take account of a connection between cases or with a view to ensuring an even spread of the workload.[346] Although this criterion has been given a broad interpretation[347], it has to be stressed that this arrangement is not transparent and that its use is completely in the discretion of the President.

President *Jaeger* stated politely in 2015 that the specialisation of chambers is "a work in progress" and assured that there is "fruitful discussion among the members".[348] Nevertheless, simultaneously some members of the GC have expressed in public critical views towards any form of formalised specialisation.[349] Thus, it comes as no surprise that the GC made an internal decision not to introduce a system of specialisation of chambers, at least for the moment, and has opted for a system which would allow for individual judges to assume expertise in certain areas.[350]

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[344] Celebration of 20 years of the Court of First Instance of the European Communities 25 September 2009, the speech of Anthony M. Collins, SC, Bar of Ireland.
[345] *Sarmiento (2015c).*
[346] Criteria for the assignment of cases to Chambers, OJ 2016 C 296, p. 2.
[347] Doc. 16904/2011, Draft amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto - Observations made by the Court of Justice in connection with the proceedings of the Council's Working Party on the Court of Justice on 14 October 2011, 14.11.2011, p. 6.
[348] *Jaeger (2017),* p. 37.
[349] See e.g. *Dehousse (2016a),* pp. 59–60. Judge *Dehousse* states that specialisation is precluded by both by the existence of a generalist court and the manner in which it is composed and refers to Judge *van der Woude* who has warned against the risk of politisation of the distribution of judicial portfolios.
[350] *Sarmiento (2017),* p. 242.

Finally, in addition to the notorious changes in the administrative services[351], attention is drawn to the special report published by the European Court of Auditors (hereinafter: ECA) in October 2017, consisting of a performance review of case management at the CJEU.[352] The report contained a series of considerations the aim of which is to improve the effectiveness of the case management of the CJEU, most of which the latter agreed to at least examine.[353] The suggestions include developing a system in which performance is measured on a case by case basis by reference to a tailored time-frame; allowing more flexibility in the allocation of *référendaires*; raising awareness of Member States as regards the importance of the timely nomination and appointment of judges; changing the rule according to which French is the only deliberation language and implementing a fully integrated IT system.[354] Even though the reform as such was left outside the scope of the report (as it was still ongoing), many of the recommendations and suggestions included therein are pertinent in the implementation of the reform and definitely merit to be considered.

5.2.3 Division of competence between the two courts

Even though the reform technically only touches the GC (and the late CST) it will without a doubt have an impact also on the CJ, as well as the institution CJEU as a whole. It has been clear from the outset that the reform will result in some shifts of competences between the two courts; primarily from the CJ to the GC, but possibly also vice versa. However, a detailed examination of the different types of action and the consequences and limitations of their potential transfer has proved that this might be easier said than done.

[351] In the foreword of the Annual Report 2017 President *Lenaerts* explains that the administrative services of the institution have been reorganised so as to bring about considerable synergies (Annual Report of the CJEU 2017, p. 11).
[352] European Court of Auditors, Special Report: Performance review of case management at the Court of Justice of the European Union (2017, N:o 14).
[353] The comments of the CJEU can be found at the end of the ECA report.
[354] The ECA report, p. 48.

The partial transfer of jurisdiction from the CJ to the GC to handle *preliminary references* has been subject of discussion ever since the establishment of the CFI[355] even though the necessary legal basis was only introduced by the Nice Treaty. Although many have considered this to be a natural and even inevitable development already before the reform[356], no serious consideration has been given to this possibility as to date. After the entry into force of the Nice Treaty the institutions were busy setting up and getting into action of the CST. And lately, the workload situation of the GC has made it quite impossible to even consider such a transfer.[357]

However, the fact remains that this body of cases forms by far the biggest group in the CJ and the number of references is constantly increasing.[358] Hence, it seemed quite logical for the legislator to stipulate for the CJ to draw up a report on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU soon after the entry into force of the reform.[359] Many commentators have supported such a transfer[360] and also President *Jaeger* has stated that transferring part of preliminary references to the GC and thus, giving it interpretative competence, is the will of the legislator.[361]

However, the issue is not that simple. The importance of preliminary references is certainly not only quantitative. The CJ has in its opinion 2/13, concerning accession of the EU to the ECHR, described the preliminary ruling procedure as the keystone of judicial system of the EU which has the object of securing uniform interpretation of EU law, "thereby serving to

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[355] For instance, *Jacqué* and *Weiler* stated as early as in 1990 that the handling of minor preliminary references is a very wasteful and inefficient way to employ the time of the CJEC and suggested that only questions referred by highest courts would stay within the CJEC. See *Jacqué and Weiler (1990),* 190-192. After the entry into force of the Nice Treaty *Vesterdorf* stated, for the same reason, that the possibility of a partial transfer should be used as soon as possible. See *Vesterdorf (2003),* pp. 314−315.

[356] See e.g. *Azizi (2006)* and *Lotarski (2004),* who suggested that preliminary references might in the future be even handled by special tribunals (p. 721).

[357] See e.g. written evidence of Advocate General Sharpston (appendix 5) in report "The Workload of the Court of Justice of the European Union" of the House of Lords' European Union Committe.

[358] Whereas in 2007 there were 265 new preliminary references, in 2012 the corresponding figure was already 404 and in 2017 a total of 533, which represents a 13% increase on the previous record set in 2016 (see the Annual Report 2016 as well as the press release No 36/2018 of the CJEU, Luxembourg, 23 March 2018).

[359] Article 3(2) of Regulation 2015/2422.

[360] See e.g. *Alemanno and Pech (2017),* pp. 174−175, *Weiler (2016)* and *Sarmiento (2015c).*

[361] See e.g. *Jaeger (2017),* pp. 17−18.

ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[362] Also, although some of the preliminary references are very technical, the fact remains that most of the important landmark judgments developing the legal system of the EU have been made in preliminary reference cases.

Hence, it was not a surprise that in its report provided for in Regulation 2015/2422[363] , the CJ came to the conclusion that there is no need to propose such a transfer, at least for the moment. The report examines both pros (such as balancing of the workloads of the two courts) and cons (such as the difficulties in defining the areas to be transferred and the risk of divergent approaches in the case-law of the CJ and the GC) and stresses that the CJ is for the time being coping well with its workload and has managed to keep the handling times of preliminary references fairly reasonable.[364] However, the CJ admitted that at some point the upward trend in the number of preliminary references may revive the question of a partial transfer of jurisdiction.

As if to compensate its reluctance to transfer of preliminary references, the CJ in its report hints to possible other alterations to the distribution of competence. The concrete result was revealed in March 2018 when the CJ gave a proposal to amend the Statute so as to, *inter alia*, transfer to the GC the partial jurisdiction in infringement proceedings.[365] In its reasoning the CJ is pointing out that the GC nowadays has the competence in most of the direct actions. According to the CJ, dealing with infringement cases requires detailed analysis of both the facts and circumstances behind the action and of the precise scope of the national legislation or practice at issue, similar to the examination the GC is accustomed to conduct. Thus, the GC seems particularly well placed to hear and determine infringement actions. However, actions based on a failure to comply with the TEU, Title V of Part Three of the TFEU (the

[362] Opinion 2/13, EU:C:2014:2454, p. 176.
[363] Report of the Court of Justice on possible changes to the distribution of competence for preliminary rulings under Article 267 TFEU, in Council doc. 15995/17.
[364] This is indeed true, as according to the latest statistics the average duration of proceedings in preliminary references in 2017 was only 15.7 months.
[365] Amendments to Protocol No 3 on the Statute of the Court of Justice of the European Union, in Council doc. 7586/1/18.

area of freedom, security and justice) or an act adopted on the basis of the latter, would stay in the CJ, as well as actions which can lead to monetary sanctions.[366]

It remains to be seen what kind of a welcome the proposal of the CJ will receive. Even though infringement cases quite seldom raise general interest or, even more seldom, contain great questions of EU law, they can be politically very sensitive for the Member State in question and thus, better suited for the CJ at least from the Member States' perspective. The Commission might also prefer, if not for reasons of expediency and procedural economy, keeping the infringement cases in the competence of the CJ and avoiding the appeal procedure. In addition, the number of new infringement actions has been in steep decline lately. Whereas the total number of new infringement actions in 2007 was 212, in 2012 there were only 58 such actions and 2016 a modest 31.[367] The Commission gave in the end of 2016 a communication[368] in which it announced that it will be "bigger and more ambitious on big things, and smaller and more modest on small things" which means, *inter alia*, adopting a more strategic and efficient approach to enforcement in terms of the handling of infringements. If this signifies that number of infringement cases will stay moderate also in the future, transferring them would not make a great difference to either of the courts as to their case-loads.

5.2.4 Quality of personnel

In an organisation much can be achieved by skilful leadership and by appropriate organisational measures. However, if the persons performing the actual assignments are not up to the job, the outcome can, at best, only be average. With its new resources the GC has all the possibilities to become a success story, but only with the right personnel.

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[366] Actions on the basis of Articles 260(2) and 258 together with 260(3).
[367] In 2017 this number had jumped up to 41, but only the following years will show if this is the beginning of an upward trend or a statistical peak.
[368] Communication from the Commission — EU law: Better results through better application, C/2016/8600, OJ C 18, 19.1.2017, pp. 10–20.

Unlike the other matters discussed above, the *quality of judges* is not something that the CJEU itself can affect. The Member States, with the participation of the Article 255 Panel, are responsible for finding the right persons and CJEU can only hope for the best.

The role of the Article 255 Panel in this process is crucial. It has not remained a rubber stamp machine but has become an active and serious actor in the process leading to the nomination (or as the case may be, rejection) of candidates for judges and advocates general, influencing indirectly also the national procedures in several Member States.[369] The first president of the Article 255 Panel, *Jean-Marc Sauvé*, stressed in his speech at the CCBE conference in 2014 the crucial importance of a rigorous application of its task to assess "candidates' suitability to perform the duties of Judge", as stipulated in the Article 255 TFEU. He stressed that the Committee puts special emphasis on evaluating the ability of a candidate to bring a meaningful and effective contribution in handling of cases, in a timely manner.[370]

The latest (fourth) activity report published by the Article 255 Panel tells that by the end of 2016, 19.1 % of the opinions it has delivered on candidatures for a first term of office have been unfavourable (no unfavourable opinions have been delivered on candidatures for the renewal of a term of office).[371] Of the six unfavourable opinions delivered by the second Article 255 Panel since March 2014, altogether five related to judges of the GC.[372] These figures show that for some Member States finding candidates meeting the requirements of the Treaties, especially for the GC, has been a "painful, excessively long and sometimes even humiliating exercise" already before the reform.[373] It should also be reminded in this context that one of the extra judges of the first phase of the reform is yet to be nominated.[374]

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[369] *Dumbrovský, Petkova and van der Sluis (2014)*, pp. 481−482.
[370] Intervention of *Jean-Marc Sauvé* in CCBE, Proceedings of the Conference “EU Courts – Looking Forward”, Brussels, pp. 13–14.
[371] Fourth activity report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, published 10 February 2017, p. 14.
[372] See the Fourth Activity report, 11. According to the report, the Panel has delivered unfavourable opinions for instance when a candidate's length of high-level professional experience has been manifestly too short, where the candidate's legal abilities have been inadequate or his knowledge of European Union law insufficient, or when there has been inconsistency between a candidate's statements and the content of his dossier. Also, a candidate's integrity and probity might have been questionable.
[373] *Abenhaïm (2014a)*.
[374] See *supra* section 4.3.

Hence, as regards the quality of judges, the ball is in the Member States' court. The Article 255 Panel cannot be expected to loosen the criteria according to which it examines the candidatures. First, these criteria are based on Treaties and secondly, the quality of judges must remain on the same level as before the reform. Anything less is unthinkable. Thus, it is for every single Member State to put all political and other national aspirations of a similar nature aside and concentrate on finding the best possible people meeting the requirements provided for in the Treaties. Also, when convening in the format of "representatives of the governments of the Member States meeting within the Council" to make the nominations, Member States will have to have the courage to follow the opinion of the Article 255 Panel and reject a candidate in potential situations (not yet realized) where a Member State would wish to defy a negative opinion of the panel. The quality of judges is both a question of appearance but also, first and foremost, a factor directly linked to the quality of judicial work. Finally, once nominated, a judge should be able to serve the GC for more than one term. By changing "its" judge every six years a Member State is disturbing the stability and effectiveness of the GC and causing incertitude not only to the judge in question but also to his or her cabinet.[375]

In addition to quality of judges, also the *quality of référendaires* is vital. *Référendaires* are responsible, under the supervision of judges and advocates general, for the drafting of various documents relating to the judicial work of the CJEU. The ECA stated in its aforementioned report concerning the management of the CJEU that quality, management and availability of *référendaires* are important factors in ensuring efficient case management and that, on the other hand, interruptions in the availability of a *référendaire* may impact adversely on the efficient processing of cases.[376] In the survey contained in the report the workload of the *référendaire* responsible for the file figured among the most frequent factors affecting the duration of the handling in both courts.[377]

[375] *Sharpston (2013),* pp. 453–454.
[376] ECA Special Report No 14/2017, paragraphs 23-24.
[377] *Ibid,* figure 7, in p. 31 and figure 8, in p. 32.

Up until now there has been no open platform for the recruitment of *référendaires* and the judges have been more or less free in forming their cabinets. There are undoubtedly advantages to this system as the relation between a judge and his or her *référendaire* must be one where mutual trust and good personal chemistry exist. However, there has also been criticism towards this practice which, together with the requirement of fluent French, results in a quite homogeneous body of *référendaires* where mindsets tend to be harmonised and where conflicts of interest are not uncommon.[378] It has been submitted that in the new situation the GC should introduce greater requirements for recruitment, more transparency in the selection process and/or a system based on a list of preselected lawyers for selection by the judges. Also, a gradual shift towards a bilingual English/French regime might become inevitable[379], although this project admittedly comes with several practical problems that would have to be overcome.[380]

5.2.5 Quality of judicial work

With good quality judges and *référendaires* it is possible for the GC to perform good quality judicial work which, alongside clearing the backlog of cases and reducing the length of proceedings, is among the aims of the reform. One of the benefits of the reform is that it offers the GC, for the first time in many years, the luxury of really concentrating on quality rather than quantity.[381] The quality of judgments is an extremely manifold issue that cannot be treated here more thoroughly. However, it is clear that quality does not start to rise automatically just by giving a court more personnel. Quite the contrary, everybody knows that if the workload is too low, the performance of the worker might paradoxically even decline as result of boredom and loss of motivation.

[378] See, for instance, *Petit (2013).*
[379] *Sarmiento (2017),* pp. 244–245.
[380] See *Naômé (2008),* pp. 115–116.
[381] Even though the quality of the judicial work of the GC has rarely been seriously questioned it is clear that an excessive workload combined with a pressure to produce more in shorter time affects the work of any organ.

One quality-related component, much discussed in the context of this reform, is the requirement for coherence and consistency of jurisprudence; if the GC starts to give incoherent and contradictory judgments its legitimacy is at stake. As explained *supra* in section 5.2.2, the GC has indeed taken measures aiming at preventing this, such as a more frequent use of five judge chambers and the tasking of the vice-president to supervise the uniformity of the jurisprudence. Nevertheless, the GC should also start using the grand chamber for real. Surprisingly, despite the frequent references to the grand chamber in the context of the process there has in reality (as of 31 December 2017) been according to the annual reports zero cases assigned to the grand chamber during the last five years.[382] Deciding cases in the grand chamber formation would the give the GC more tools to make principled decisions and deal with complex constitutional issues, and the quality and the legitimacy of its judicial work would most certainly be reinforced.[383] It should be stressed that in the CJ the grand chamber has become a kind of a quality label marking the importance of the case and the authority of the judgment.[384]

In this context it should also be noted that the CJ has lately leaned more and more towards a practice whereby its judgements become very concise and, at the same time, less informative. Although it has been claimed that the CJ has in its judgments, since the 1990's, engaged much more with the arguments of the parties[385], lately it seems to be reverting back towards the original practice whereby judgments were terse, omitting any references to the arguments presented to it in written and oral submissions. This regrettable practice, that allows the CJ to ignore the arguments running counter to its conclusions, reduces the legitimacy and general usefulness of the judgements and sometimes makes them harder to understand, especially as dissenting opinions do not exist.[386] The GC now has the chance to take the opposite direction

[382] Annual Report of the CJEU 2017, p. 216 and p. 221.
[383] *Sarmiento (2017)*, p. 245.
[384] Although the fact that the Member States and institutions have, when they are parties to a case, the right to ask for the case to be handled by the grand chamber [Article 16(3) of the Statute]) somewhat inflates this label.
[385] *Tridimas (2018)*, p. 603.
[386] See e.g. Case C-284/16, *Achmea*. This case concerning arbitral tribunals provided by bilateral investment treaties concluded between Member States is of great importance both for the development of EU law and politically, considering the ongoing international efforts around investment treaties and the dispute resolution related to them. However, in its judgement the CJ concluded in a very concise manner that the tribunals in

and start making judgments that not only solve the actual question but also contribute to the development of EU law and provide useful information on the background of the solutions adopted in the judgment.

5.2.6 The CJEU as an institutional actor

Finally, the lengthy and difficult process leading to the reform has also provoked reflections related to the CJEU as an institutional actor. This subject has until now not been discussed much, probably because the legislative processes leading to earlier reforms and other amendments of the Statute have run quite smoothly from the procedural point of view. However, the painful process leading to the latest reform has revived discussion over the CJEU as an institutional actor.

First, the role of the CJ in the legislative process has been debated at length in the margins of the reform process. The critics have discussed both the central role that Article 281 TFEU confines to the judiciary itself when changing its Statute and the fact that inside the CJEU only the CJ has a role in the legislative process. Although the GC nowadays in practice is involved in the process of preparing changes in the Statute, the CJ can solely decide the content of the proposal, as the reform process demonstrated.

Keppenne has written a whole article in which he examines the CJEU as a "norm producer" and comes to the conclusion that when assessing the current system in the light of the principle of the separation of powers and the principle of institutional independence, there is room for improvements, especially as regards the active involvement of judges in the legislative process when changing the Statute.[387] *Alemanno* and *Pech*, for their part, devoted in their article of 2017 several pages for the examination of the administrative relationship of the two courts, distorted for the advantage of the CJ.[388] Judge *Dehousse*, for his part, states

question breached the autonomy of EU law, without summarising the arguments of the Parties of the 16 Member States participating in the proceedings and thus, without addressing the counter-arguments.

[387] *Keppenne (2017).*

[388] *Alemanno and Pech (2017),* pp. 167−172.

that this provision creates a "dangerous confusion of powers that will always generate serious tensions in a system that is purportedly grounded upon the principle of the separation of powers", referring in also to an interview in which President *Lenaerts* at least implicitly seems to admit the shortcomings of the system.[389] According to *Dehousse*, the best solution would be to simply repeal the legislative initiative of the CJ and the second best option to attribute this competence to the institution as a whole and not one of its constituent courts. In a similar vein, *Alemanno* and *Pech* have talked about the "rather unorthodox possibility laid down in EU primary law, which allowed in this instance the judicial branch to initiate the legislative process with the view of securing additional resources for itself" and illustrated the problems related to Article 281 TEFU by highlighting certain defects occurred during the reform process.[390] They also criticize the fact that the exercise of administrative and legislative powers of the institution is concentrated in the hands of the president of the CJ and the weekly *réunion générale*.[391]

Secondly, also the fact that the president of the CJ is at the same time the president of the whole institution has been discussed, as well as the vast powers of the president. *Alemanno* and *Pech* have stated that the possibility for the CJ and its president to take decisions and make proposals without meaningfully engaging the GC raises questions both as regards the representative nature of the CJEU's administrative decisions and their legitimacy.[392] In addition, although the legacy and the many achievements of President *Skouris* have been widely acknowledged[393] and President *Lenaerts* has been described as being, among many other positive attributes, "a natural consensus-builder", it has been recognised that the situation where the president of the CJ is at the same time the president of the CJEU is apt to cause conflicts.[394] Also, *Sarmiento* has speculated that a president of the institution, elected

[389] *Dehousse (2016a)* p. 67 and fn 144.
[390] *Alemanno and Pech (2017)*, pp. 146−147.
[391] *Alemanno and Pech (2017)*, pp. 166−169. The general meeting, commonly referred to with its French name "*reunion générale*" gathers all Mambers of the CJ and, according to Article 25 of the Rules of Procedure of the Court of Justice, makes *inter alia* the decisions concerning the administrative issues.
[392] *Alemanno and Pech (2017)*, p. 168.
[393] See e.g. *Sarmiento (2015a)*.
[394] *Sarmiento (2015c)*.

solely by the judges of the CJ, might in the future have a tough time with a GC consisting of 56 members, at least if he does not have the same leadership qualities as the current one.[395]

6 Conclusions

There is no denying that the reform has several shortcomings. Even though some of the critique summarised in section 5.1 seems exaggerated[396] or unfounded[397], the number of new judges is indeed excessive. The need to add as many as 28 (or 21) judges has never really been demonstrated in light of statistics, the evolution of the workload of the GC has been more moderate than initially portrayed[398] and, in addition, the GC managed to enhance its effectiveness remarkably right before the reform. This is something that is generally hard to swallow; the risk of wasting public money and having highly remunerated judges sitting in their offices with nothing to do is considered much bigger a sin than those judges having too much work. The global financial and economic crisis that has touched all Member States, forcing many of them to undertake drastic measures hitting the personnel of the public sector, certainly makes the comparison even more striking. Moreover, the abolishment of the CST and at the same time the three-level court system is a loss, notwithstanding the practical problems related to the appointments in the CST. And the process through which the reform was adopted can certainly not be used in the future as an example of good legislative practice.

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[395] *Sarmiento (2015c).*

[396] The theory of *Alemanno and Pech* according to which striving for better quality was purely an ex post rationale invented by President *Lenaerts* [*Alemanno and Pech (2017),* pp. 157–159] does not seem justified. For instance, the presidency document of 2014 entitled "Reform of the General Court - Way forward", forming the basis of the political agreement on the reform as it stands, states in its paragraph 10 that the increase would have a positive impact on the quality of the judgments of the GC (doc. 16576/14).

[397] For instance, the claims that the is no legal basis for the abolishment of a special tribunal seem petty and theoretical. It seems that the right to abolish an existing special tribunal is implicitly included in the legal basis without it being necessary for the legal basis to read that the Council and the European Parliament "may establish and abolish specialised courts". Actually, the provision of TEU 19 according to which the CJEU "shall include the Court of Justice, the General Court and specialised courts" seems more problematic from this point of view.

[398] For instance, the text of the proposal of 2011 predicted that further litigation will be generated by the application of the REACH Regulation. However, during the past 5 years there have been only 3 to 9 new cases related to REACH Regulation per year. Annual Report of the CJEU 2017, p. 213.

It is important to note that very little of this all is attributed to the CJEU itself but to the legislator. However, the complications did not stem from the participation of the European Parliament in the ordinary legislative procedure, as could perhaps been expected, but were first and foremost attributable to the Member States whose power struggle led the CJEU into an impasse from which the only way out was the doubling of the number of judges.[399] First, had the Member States been able to agree on a method of distributing a reasonable number of posts of extra judges among themselves, the number of judges could have been set exactly to the level considered appropriate and necessary. Secondly, the recurrent problems regarding the nationality of judges to be nominated to the CST by the Member States made it easy to motivate why the CST should be abolished although its work was generally praised. In summary, as *Abenhaïm* has stated, it is "a shame that in 2014, more than 55 years after the Treaty of Rome, member states still seem to perceive EU judges as mere guardians of their sovereign prerogatives".[400]

However, the reform is a reality and it is time to focus on something more constructive than listing its flaws. The relevant question obviously is whether the procedural and substantive shortcomings of the reform mean that it is deemed to be a failure, now and forever. Or could the CJEU manage to turn the reform if not into a glaring success story, at least a legitimate improvement of the CJEU system?

Even though it is way too early to draw definitive conclusions, the figures from last year seem to indicate that something is not working. Although the reform has already had a positive impact on handling times and although according to President *Jaeger* the GC will reach its "new cruising speed" only in 2018, the fact is that the productivity per judge has

[399] In practice the only alternative option was "no reform" and it does not seem probable that a solution based on adding only *référendaires* and administrative personnel, as suggested by some would have sufficed to clear the backlog of cases and to shorten the handling times while maintaining the quality, as well as to ensure all this also in the future. First, the backlog of cases was (and still is) large and, if we believe the CJEU, the workload is likely to rise and secondly, even if each cabinet would have an army of *référendaires*, there is only so much one judge can digest. Even though the GC had managed to enhance its effectiveness as regards the number of completed cases, in 2015 the duration of proceedings was still unacceptably long (in competition cases, for instance, the average handling time was 49.3 months).

[400] *Abenhaïm (2014a).*

dropped considerably and the stock of pending cases keeps rising. As in 2019 the GC will see the arrival of yet 9 more judges, it is possible that the productivity per judge will drop even further. Hence, it seems that the future success of the reform is in the hands of the CJEU itself. It must be ready to, funnily enough, *reform* in order to properly benefit from the reform.

First, as stated earlier in section 5.2.3, there should be transfers of jurisdiction from the CJ to the GC. This is essential for a more even distribution of the total workload of the CJEU, which in turn enables the institution as a whole to use its overall resources in the best and most effective way possible. At the moment it seems that the partial transfer of competence to give preliminary rulings would make more sense than giving the GC the power to rule on infringement actions.

The main reasons for this are that because of their small numbers the transfer of infringement actions would not have sufficient impact on the workload of the respective courts, and that their transfer would entail prolongation of the infringement procedure, something that is detrimental to the efficiency of EU law and the rights of the citizens. Preliminary references, on the other hand, represent a considerable proportion of the workload of the CJ.[401] The criteria for the transfer could be either formal (for instance leaving to the CJ references made on by the highest national courts and references questioning the validity of an act[402]), or substantive (transferring to the GC references concerning certain areas such as value added tax, custom duties and trademarks). It should also be stressed that the CJ could always handle an individual case if the GC considers that it requires a decision of principle likely to affect the unity or consistency of union law or if there is a serious risk of the unity or consistency of Union law being affected.[403] This is why the reasoning of the CJ according to which any case might contain questions of principle or questions of a cross-cutting nature does not seem sufficiently convincing to outweigh the benefits of transfer in an area where long experience has shown that the great majority of cases are very technical.

[401] In 2017, for instance, preliminary references represented 72 % of all new cases (Annual Report of the CJEU 2017, p. 102).
[402] *Arnull (2018)*, pp. 13−14.
[403] Articles 256(2) and 256(3) TFEU.

However, in order to genuinely invest in both efficiency and quality, the GC should also have a serious look at the creation of specialised chambers and the proper introduction of the advocate general institution. In addition, in view of future needs, it might be helpful to amend the provisions governing the legislative process as regards changing the Statute.

First, as regards specialised chambers, the distribution and the handling of cases in an adequate manner and ensuring the coherence of the jurisprudence in a 56-member court where all judges and all chambers in principle treat all kinds of cases seems extremely laborious and very ineffective. Also, the application of the famous "connection criterion" becomes more and more difficult as the number of judges and the number of cases rise. Creating a clear, transparent and predictable system of distributing judges (and cases) into different chambers, including the grand chamber (the use of which the GC should commence) and several different specialist chambers, would also help to remedy the potential factual inequality between judges coming from different Member States[404] and hence, enhance the collegiality of judges, something that is hard to maintain in a 56-member court.

As explained *supra* in section 5.2.2, there are also counter-arguments to the creation of special chambers. However, no solution is perfect and the arguments opposing specialist chambers do not seem insurmountable. Many of them actually relate to the situation where there would only be one judge per Member State[405] and, in any case, the advantages of specialisation are outweighed by its benefits.[406] It is important to note that unlike some critics seem to think, creating specialised chambers does not go hand in hand with the recruitment of specialised judges.[407] Full-fledged specialisation would of course necessitate recruiting specialists. However, one could also think of a system of "light specialisation" in which

[404] On inequality between judges after the latest big enlargement see *Dumbrovsky (2011)*, pp. 25−28.
[405] See, for instance, "An EU Competition Court: report with evidence", 15th report of session 2006-07, paragraph 201.
[406] See also *Öberg, Ali and Sabouret (2018)*, pp. 222−223.
[407] See also the letter of the Registrar of the CJ, sent to the Council presidency in November 2011, according to which "specialisation of chambers must not be confused with specialisation of Judges" (in Council doc. 16904/2011, p. 7).

specified chambers would only handle certain types of cases, even though the judges assigned to it might not originally be specialists in that area of law.[408] The judges of the chamber would soon gain in-depth experience through work and the chamber would create an institutional memory of its own, ensuring a more effective handling of cases and the development of a coherent body of jurisprudence despite the gradual replacement of its judges. A natural candidate for areas that could be transferred to specialised chambers is – in addition to the notorious staff cases – intellectual property.[409] Cases representing this subject-matter have at least for the past ten years steadily represented around 30-40 % of the GC's caseload.[410] Also state aid and competition are areas that could be directed to a specialised chamber, as well as the growing area of banking and finance. [411]

Secondly, the genuine introduction of the advocate general institution, instead of the possibility of nominating the vice-president to act as one, should definitely be considered. Although the use of advocates general comes with a little longer handling times[412], this should not be a big problem as the GC now has the necessary tools to efficiently manage its handling times in general. Assigning an advocate general for the most important cases would add the legitimacy of the judicial work of the GC and bring it one step closer to the CJ, as regards its nature. Moreover, nominating for instance eight judges to act as advocates general would also help in solving the (plausible) problem of there being simply too many judges and too little work.[413]

Thirdly, next time the Treaties are "opened" in an IGC, serious consideration should be given to the possible changes in the decision-making procedures related to amendments of the

[408] This kind of a system was proposed already in 2000 in the Due report (pp. 49−50), according to which "[s]pecialisation of this kind does not mean that the Judges themselves must become specialised: the Members of the specialised Chambers must remain full Members of the Court of First Instance, having received the same training and having been appointed on the same terms as their colleagues. Moreover, the assignment of a Judge to a specialised Chamber should not normally be on a permanent basis."
[409] See *Jaeger (2017)*, pp. 18−19 and *Sarmiento (2015c)*.
[410] Annual Report of the CJEU 2017, p. 211 and Annual Report of the CJEU 2012, p. 182.
[411] Annual Report of the CJEU 2017, the text by President *Jaeger*, p. 138 and the statistics, p. 210.
[412] For instance, in the Annual Report 2015 the possibility of giving judgment without the opinion of an advocate general is mentioned among the measures through which the CJ has managed to gain efficiency and to expedite the handling of cases (Annual Report of the CJEU 2015, p. 9).
[413] See e.g. *Hirst (2016)* and *Alemanno (2017)*.

Statute (see *supra* section 5.2.6); perhaps the legislative process had been more straightforward and the tensions smaller had the involvement of the court itself been lesser and the proposals prepared in a more neutral composition.

In addition to these well-known and much-debated options there are certainly also a range of other ideas that the CJEU could explore. What is needed is an open mind and readiness to find and implement new and innovative ways to organise the administration of justice. The CJEU should start a process of ambitious brainstorming in which also the academia, the representatives of the users of the courts and other stakeholders could contribute in a modern, transparent manner. This would help to improve the CJEU system as a whole and benefit the legal subjects. It could possibly even enhance the legitimacy of the reform process *ex post*. The CJEU now has a "million-dollar" chance to make its constitutive courts excel both in effectiveness and quality, but it takes an extra effort.

Be that as it may, this hardly remains the last reform in the continuum of modifications of the structure of the CJEU. If this reform proves not to be a success – or even if it does – we can trust that the present structure is not cast in stone. There will be modifications also in the future.

Not surprisingly, there has already been discussion about returning to the three-layer system.[414] In addition, many commentators have throughout the years predicted that the CJ will eventually become a genuine constitutional court, concentrating only on most important cases of a constitutional nature and those that may jeopardize the unity and consistency of EU law, and the big bulk of more mundane cases will be left to the GC.[415] This is actually the trend we are witnessing today, although the CJ still resembles more a supreme court than an exclusively constitutional court.[416] Some have even speculated that it might at some point be opportune for reasons related to cohesion and collegiality to reduce the size of the CJ so as to allow it to genuinely concentrate on controlling the uniform interpretation of EU law and to

[414] *Dehousse (2018)*, pp. 29–30.
[415] See for example *Lotarski (2004),* pp. 721–723, J*acqué ja Weiler (1990)*, pp. 190–191, *Scorey (1996),* p. 231 and *Jacobs (2013),* p. 51.
[416] *Vesterdorf (2006),* p. 607.

sit in plenary session[417], which still in the 1990's was frequent practice.[418] Others have envisioned an even more radical restructuring towards a decentralised system composed of regional courts[419] that could perhaps be specialised.[420] Who knows, maybe one day. However, at least for the foreseeable future the CJEU remains firmly placed in its native Luxembourg, the plateau of Kirchberg.

[417] See *Iannone (2005),* p. 163 and *Rosas (2004)*.
[418] *Edward (2004)*, pp. 126−127.
[419] See *Rodriguez Iglesias (2013),* pp. 47−48, *Jacqué and Weiler (1990*), pp. 192−195 and *Arnull (1994),* p. 316.
[420] *Van Gerven (1996),* p. 218.